84-1370

Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS
CLERK

No. .....

In The
Supreme Court of the United States
October Term, 1984

AMY AUSTIN, A MINOR, ET AL.,
Petitioners,

vs.

BROWN LOCAL SCHOOL DISTRICT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHELDON STEIN
Counsel of Record
1226 Standard Building
Post Office Box 5606
Cleveland, Ohio 44101
(216) 696-7449

STANLEY MORGANSTERN
Suite 800 - One Public Square
Cleveland, Ohio 44113
(216) 621-4244

CESARE REFE
1210 Standard Building
Cleveland, Ohio 44113
(216) 566-1466

Attorneys for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

105P

QUESTIONS PRESENTED FOR REVIEW

1. Whether in matters concerning the failure of the education of handicapped children, if damages are recoverable under 42 U.S.C. § 1983 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, where the remedies provided by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401, *et seq.*, are not adequate.

2. Whether in matters concerning the failure of the education of handicapped children, if a civil action for monetary damages, based upon 42 U.S.C. § 1983, can be maintained due to the mistreatment of a handicapped child by school officials, notwithstanding the Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTION AND STATUTES INVOLVED	2
STATEMENT OF FACTS	7
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	18

APPENDIX:

Opinion and Order of the United States Court of Appeals for the Sixth Circuit (October 25, 1984) ..... App. 1

Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division (April 26, 1983) ..... App. 13

Exhibits attached to the Petitioners' Memorandum in Opposition to Motion for Summary Judgment:

1. Investigative Report of the United States Department of Education, Office of Civil Rights. ..... App. 17
2. Affidavit of Linda Austin. ..... App. 45
3. Affidavit of Nancy Klein, PhD. ..... App. 48
4. Affidavit of Robert I. Lesowitz, M.D. ..... App. 56
5. Report of Referee David Wm. T. Carroll (Ohio State Board of Education) ..... App. 61

TABLE OF AUTHORITIES

Page

CASES

Bell v. Hood, 327 U.S. 678 (1946) 14

Irving Independent School District v. Tatro, — U.S. —, 104 S.Ct. 3371 (1984) 14, 15, 16

Middlesex County Sewage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981) 10

Smith v. Robinson, — U.S. —, 104 S.Ct. 3457 (1984) 12, 13, 14, 15, 16, 18

CONSTITUTIONAL PROVISION, STATUTES, AND RULES

U.S. Constitution, Fourteenth Amendment 2

20 U.S.C. §§ 1401, *et seq.* 10, 16, 18

20 U.S.C. § 1413(a) (12) 6

20 U.S.C. § 1415 ..... 3, 8

28 U.S.C. § 1254 2

29 U.S.C. § 706(7) 3

29 U.S.C. § 794 ..... 3, 9, 10, 13, 14, 15, 16, 18

42 U.S.C. § 1983 ..... 2, 9, 10, 16, 17, 18, 19

42 U.S.C. §§ 1983 and 1984(3) 17

Ohio Revised Code § 3323.05(E) 8

No. _____

In The

Supreme Court of the United States

October Term, 1984

AMY AUSTIN, A MINOR, ET AL.,

Petitioners,

vs.

BROWN LOCAL SCHOOL DISTRICT, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Amy Austin, a minor, by and through Linda and Harold Austin, her parents and next friends, respectfully pray that a Writ of Certiorari issue to review judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on October 25, 1984, entered in the above-entitled action.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported. The opinion is set forth in the Appendix at page App. 1.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported. The opinion is set forth in the Appendix at page App. 13.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the Unit-

ed States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS § 706 (7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

20 U.S.C. § 1415

(Relevant portion of the Education for All Handicapped Children Act)

§ 1415. Procedural safeguards

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any in-

termediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing.

The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a) (12) [20 USCS § 1413(a) (12)]).

(e) Civil action; jurisdiction. (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final. except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c) and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

———o———

STATEMENT OF FACTS

Since her birth, Amy has been handicapped, diagnosed as being in the severely retarded range of mental ability. Amy was recognized as being a fearful, inhibited child. Due to this evaluation, it was observed that high stress produces withdrawing behavior in Amy and her program should emphasize the development of language, a low stress level, and a positive social interaction.

Amy attended the Kent City School District's "autistic-like" special education program in 1975 and 1976.

Though shy and withdrawn at first, Amy made tremendous progress, becoming less withdrawn, more confident and better behaved. As a result, Amy began to take part in, and experience the joys of family activities. Amy was developing a happy, peaceful existence in spite of her handicap.

Nonetheless, she was transferred by the Brown Local School District in September, 1976, to a new program at Malvern School in that district. No Individual Education Program (IEP) was prepared and no psychological testing was performed until almost three years later. Amy was exposed to questionable treatment from the school district, and suffered from the stress of undue peer pressure, ridicule, and harrassment from non-handicapped students while at Malvern. As a result, Amy severely regressed. Her scholastic skills deteriorated, she became withdrawn and despondent, and lost her self confidence. Amy became unable to participate and experience the joys of family activities.

The situation at Malvern did not improve in spite of Petitioners' complaints, and Amy was eventually placed in a program at Lathrop School in the Canton School district, where the deterioration continued.

At Lathrop, Amy was subjected to a "behavior modification program" featuring confrontation, corporal punishment and confinement. Amy became afraid of the world, lost weight and became frequently ill.

The Austins sought an impartial due process hearing regarding the appropriateness of Amy's placement, as provided for by Ohio law (Ohio Revised Code § 3323.05 (E)) and by the EAHCA, 20 U.S.C. § 1415(c). At the

due process hearing held in March, 1981, the Austins and school officials presented testimony and other evidence regarding the appropriateness of Amy's placement. The hearing officer found that the Brown Local School District had provided Amy with the requisite free appropriate public education through placement in the Lathrop School program.

The Austins appealed the findings to the Ohio State Board of Education, which referred the matter to a referee for a report and recommendation. The referee found that Amy had not been provided with a free, appropriate education. The State Board of Education reviewed and rejected the referee's finding. Thereafter, the Petitioners instituted this action in December, 1981, pursuant to 20 U.S.C. §§ 1415, *et seq.* (EAHCA), 29 U.S.C. § 794, and 42 U.S.C. § 1983 seeking declaratory judgment, injunctive relief requiring Respondent's to provide Amy a free appropriate education, as well as compensatory and punitive damages due to the mistreatment of Amy Austin, costs, and attorney fees.

In that action, the Respondents moved for partial summary judgment as to the § 504 and § 1983 claims on the ground that no cause of action could be maintained except under the provisions of the EAHCA, which did not provide for monetary relief. The District Court agreed, and in an unpublished opinion and order granted partial summary judgment in favor of the Respondents. The Petitioners then voluntarily dismissed their EAHCA claims, and appealed the final judgment dismissing the other claims. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I. In Situations Concerning The Education Of Handicapped Children, Monetary Damages Should Be Recoverable Pursuant To 42 U.S.C. 1983 And Section 504 Of The Rehabilitation Act Of 1973, 29 U.S.C. 794, et seq., Where The Education For All Handicapped Children Act Of 1975, 20 U.S.C. 1401, et seq., Fails To Provide An Adequate Remedy.

The Petitioners are seeking relief for the injuries that Amy Austin suffered as a direct and proximate consequence of discriminatory treatment and deprivation of her rights by Respondents. Petitioners are not urging this court to create new law, but only to clarify this court's position in a situation where severe injury has resulted from failure to provide a handicapped child with a free appropriate education, and where the remedy provided for by the EAHCA is not adequate.

Normally, suits to redress civil rights violations by state officials are authorized by 42 U.S.C. § 1983. However, such action is precluded where the wrongful conduct is based upon a violation of a federal statute which contains sufficiently comprehensive remedial scheme, and which, therefore, evidences a congressional intent to foreclose an action brought pursuant to 42 U.S.C. § 1983. *Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

It has been argued that § 615 of the EAHCA contains a sufficiently comprehensive remedial scheme evidencing congressional intent to foreclose an action under 42 U.S.C. § 1983. This was the reasoning the District Court offered in granting Respondents' Motion for Partial Summary Judgment below.

In this action, however, the EAHCA does not provide an adequate remedy for Amy Austin. This is not simply a situation where a handicapped individual is asserting her right to a free and appropriate education. Petitioners contend that the EAHCA does not provide an adequate remedy in light of the actual damage visited upon her.

Here, Petitioners pleas for an appropriate education and equal protection went unheard for so long that the result was injuries that go far beyond mere discrimination and the failure to provide a free, appropriate education. In this case the flagrant disregard of Petitioner's rights and interests has negated any advancements that Amy had made under her previous educational program at Kent. In fact, Amy Austin's learning and interpersonal skills have regressed and her psychological and behavioral condition has deteriorated. It is unclear at this point whether that which has been lost can ever be regained. Because Petitioners are not entitled to a monetary award of damages under the EAHCA, Amy, can never, based upon the rulings made in this case, be compensated for what the Respondents have taken away from her. As a consequence of the Respondents failure to provide suitable program, and due to the mistreatment of Amy, they have, in effect, stolen from Amy the advancements she had made prior to her entering the Brown Local School District. The current statutory scheme of the EAHCA is, therefore, not adequate to protect Amy Austin because it does not fully compensate her for injury which cannot be undone.

It is due to the unusual nature of Petitioner's injuries that the EAHCA does not provide for adequate relief in this circumstance. It is submitted that it was the intent

of Congress when they drafted the EAHCA that they did not intend to foreclose relief in a situation such as this. Petitioners maintain that the intent of Congress to preclude huge monetary awards where the sole injury complained of is for deprivation of a free and appropriate education. Logic and public policy tells us that there must be an alternate or supplemental monetary remedy where that deprivation has resulted in a real and substantial injury.

The Circuit Court of Appeals, in considering whether Partial Summary Judgment by the District Court was proper, cited *Smith v. Robinson,* — U.S. —, 104 S.Ct. 3457 (1984) which held that where the EAHCA is available to a handicapped child asserting a right to a free and appropriate education, based either on the EAHCA or on the Equal Protection Clause of the Fourteenth Amendment, it is the exclusive avenue through which the child and his parents can pursue their claim.

The court observed that allowing a Plaintiff to circumvent the (EAHCA) administrative remedies would be inconsistent with Congress' carefully tailored scheme. However, in footnote 24 of the *Smith* opinion, Justice Blackmun noted that damages are available under the (EAHCA) in exceptional circumstances. Petitioners maintain that this case presents such exceptional circumstances. It should be noted that the *Smith* opinion did not discuss the issue of whether an aggrieved party that has also suffered actual injuries, in addition to a deprivation of a free appropriate education, and therefore is not dispositive to this issue.

In *Smith* the only remedy necessary was provided for by the EAHCA. In the instant action, restricting Petit-

ioners' avenue of relief to the EAHCA denies them compensation for the injuries suffered and is against public policy.

Thus, it is clear that the intervention of this court is needed to clarify the holding in *Smith v. Robinson* so that, once and for all, litigants and aggrieved parties are left with a definite legal standard in cases where the EAHCA does not provide an adequate remedy.

The District Court used the same reasoning as above in granting Partial Summary Judgment on the issue of whether damages are recoverable under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 where the EAHCA fails to provide an adequate remedy.

It is argued that the Rehabilitation Act does not concern or otherwise provide a free and appropriate education. 29 U.S.C. § 794 provides in pertinent part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation, in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

While § 504 does not specifically refer to a free and appropriate education, it specifically provides that no otherwise qualified individual shall be subjected to discrimination in Federally funded programs by reason of his handicap. In this action Petitioners were discriminated against due to Amy's handicap, and that discrimination resulted in injuries far beyond mere deprivation of her right to the required education.

As early as 1946, the Supreme Court held in *Bell v. Hood,* 327 U.S. 678, 685 (1946) that, "[w]hen Federally protected rights have been invaded, it has been the rule *that courts will be alert to adjust their remidies so as to grant the necessary relief.*" (emphasis added.)

The language of the *Bell* opinion suggests Federal Courts are charged with adjusting their remedies to ensure the necessary relief. In this action, restricting Petitioners remedy to that which is provided by the EAHCA does not provide the necessary relief.

A situation where the EAHCA provides adequate relief would be where the sole injury complained of is deprivation of the required education. In a case such as the one at bar, however, the discriminatory acts of Respondent and the mistreatment of Amy Austin has resulted in severe injuries to Amy Austin, and restricting her remedy to those provided by the EAHCA is analgous to closing the barn-door after the horse is gone. The EAHCA ensures that Petitioner and those similarly situated, receive a free and appropriate education, but provide no relief for the actual severe injuries she has suffered apart from the lack of education suffered as the direct and proximate result of the discrimination toward her.

Petitioners action under § 504 is not intended to circumvent the EAHCA. This was the view expressed by the Circuit Court of Appeals as it considered whether Partial Summary Judgment was properly granted by the District Court as to this issue. The Circuit Court cited *Smith v. Robinson, supra,* and *Irving Independent School District v. Tatro,* — U.S. —, 104 S.Ct. 3371, 3379 (1984) to support their position that Partial Summary Judgment

was proper. *Irving* was decided the same day as *Smith*, and this court referred to *Smith* in its opinion in *Irving*, holding that, "§ 504 is inapplicable when relief is available under the Education of Handicapped Act to remedy a denial of Education Services." *Irving*, — U.S. —, S.Ct. at 3379.

Here again, *Smith* and *Irving* are not dispositive because adequate relief is not available through the EAHCA. This honorable court recognized this possibility in the holding in *Smith*, stating

> We emphasize the narrowness of our holding. We do not address a situation where the (EAHCA) is not available or where § 504 guarantees substantive rights greater than those available under the (EAHCA). We hold only that where . . . whatever remedy might be provided under § 504 is provided with more clarity and precision under the (EAHCA), a Plaintiff may not circumvent or enlarge on the remedies available under the (EAHCA) by resort to § 504.. — U.S. —, 104 S.Ct. at 3474.

In this action, a remedy under § 504 would address the consequential injuries suffered by Petitioners, whereas the EAHCA would only ensure a free and appropriate education. Therefore it could not be said that an adequate remedy is available under the EAHCA.

It is just this type of situation which this court contemplated in reaching the decision in *Smith*. In this case monetary recovery under § 504 would not circumvent the remedy provided in the EAHCA because the EAHCA stops short of providing an adequate remedy in situations where, as here, the injury complained of and the appropriate remedy is not provided for in the EAHCA. As mentioned earlier, this is not merely a situation where an

individual has been deprived of her rights or otherwise discriminated against. Here, that deprivation and discrimination has resulted in severe injuries to Petitioners, exacerbating an already difficult existence due to Amy's handicap.

The injuries complained of here have no remedy available under the EAHCA, and, therefore, Petitioners' right of action is not excluded or exhausted by the Act. A § 504 action in this case would supplement and not circumvent the remedy available under the EAHCA.

Therefore, it is respectfully submitted that the holdings of *Smith v. Robinson* and *Irving Independent School District v. Tatro* do not provide sufficient guidance in situations where the EAHCA does not provide adequate remedies, and that a definitive ruling by this court is therefore needed.

II. In Situations Concerning The Education Of Handicapped Children, An Aggrieved Party Can Maintain A Cause Of Action For Money Damages Pursuant To 42 U.S.C. § 1983 Due To The Mistreatment Of A Handicapped Student By School Officials Notwithstanding The Provisions Of The Education For All Handicapped Children Act, 20 U.S.C. §§ 1401 et seq.

The remaining issue to be resolved is whether Petitioners properly established a separate and independent claim for violation of her constitutional right to substantive due process of law by reason of the mistreatment of Amy Austin. The District Court failed to address this issue. Upon appeal to the Circuit Court, Chief Judge Lively properly noted that, "Maintenance of an independent due

process challenge to state procedures would not be inconsistent with the EAHCA's comprehensive scheme." Notwithstanding, the Circuit Court held that no due process claim was presented as an independent challenge, and, therefore, this claim did not warrant consideration.

The Circuit Court reasoned that the § 1983 claims were "interwoven" with the EAHCA claims, and that no separate cause of action existed. The record, however, establishes that Petitioners' due process claims are separate from their other claims.

Directing this courts attention to Petitioners' Fifth Cause of Action, specifically paragraph 29 at page 7 of the initial complaint, which clearly states that, "[b]y reason of the acts, practices and ommissions of the Defendants, and each of them as aforesaid, the Defendants conspired and caused the Plaintiffs to suffer deprivations of their constitutional rights of due process of law . . ."

Contained in the Second Cause of Action of the complaint, specifically paragraphs 19 through 23, is a clearly stated separate and independent cause of action for violation of the EAHCA. The circuit court apparently felt that simply because Petitioners referred to Amy's deprivation of a free and appropriate education in their due process claim that somehow the two causes of action were "interwoven", and not independent.

As further evidence that these are separate and independent causes of action, paragraph three of the complaint specifically states, "[t]his is also an action seeking redress under 42 U.S.C. §§ 1983 and 1985 (3) for the deprivation under color of state law, practice, custom, or usage, of rights guaranteed the Plaintiffs by the Constitu-

tions and laws of the United States and the state of Ohio."

The action under 20 U.S.C. § 1401 *et seq.* is separately referred to in paragraph two of the complaint. The record is inconsistent with the Circuit Court's reasoning that the § 1983 claim for deprivation of due process is not separately and independently stated, apart from the claim under the EAHCA. The record evidences that the due process claim is separately and independently claimed, and, therefore, warrants resolution by the courts.

Lastly, although the concepts of due process and free appropriate education are interwoven, the Petitioners also seek damages for mistreatment of Amy Austin. The record reflects that such took place. See, e.g., affidavits of Linda Austin, Nancy Klein, PHD., Robert I. Lesowit, M.D., Report of Referee David Carroll, Report of U.S. Department of Education, all of which were attached to Petitioners' Brief in Opposition to Motion for Summary Judgment, and are set forth in the Appendix. The failure of the courts below to respect the record justifies intervention by the court in this matter.

CONCLUSION

The decision in *Smith v. Robinson* held only that the remedy available under the EAHCA is the exclusive remedy unless relief is not adequate under the EAHCA. In the action at bar, the EAHCA cannot provide the necessary relief, and therefore, a § 1983 remedy and a § 504 remedy would not circumvent the EAHCA, but only supplement it by providing an adequate remedy for the injuries

suffered here by the Petitioners. A denial of these avenues of relief in this instance, and in general would create great injustice, and only serves to preclude a handicapped child from compensation for the injuries resulting from such flagrant discrimination and mistreatment. There is no compelling state interest in allowing the Respondents to escape or shift liability, thereby eliminating the only avenues of relief available to Petitioners. Affirming the decisions of the District Court and the Circuit Court of Appeals will only perpetuate this type of discriminatory treatment and render the Rehabilitation Act of 1973 and the Civil Rights Act of 1871, 42 U.S.C. § 1983 useless to those who need it most, handicapped children. All we ask here is that this honorable court clarify its position as to these issues and help Amy Austin and all like her to take a step forward.

The future of all handicapped children rests on the decision of this Court as to the issues presented here. It is respectfully requested that this Court accept this responsibility and ensure fair treatment for our handicapped as it has for so many other classes of people.

For the foregoing reasons, the Petitioners respectfully pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

Respectfully submitted,

SHELDON STEIN
Counsel of Record

STANLEY MORGANSTERN
CESARE REFE

Attorneys for the Petitioner

APPENDIX

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION

See, Sixth Circuit Rule 24

No. 83-3384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMY AUSTIN, et al.,

Plaintiffs-Appellants,

v.

BROWN LOCAL SCHOOL DISTRICT, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed October 25, 1984

Before: LIVELY, Chief Judge; KEITH, Circuit Judge; and ALLEN, Chief District Judge.*

LIVELY, Chief Judge. This case concerns the relationship among the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. § 1401 et seq. (1976), the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) and section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 (1976), as they pertain to the education of a handicapped child. The specific question for decision is whether the district court committed re-

---

* The Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

versible error in dismissing claims under § 504 of the Rehabilitation Act and 42 U.S.C. § 1983 upon determining that these claims were based upon an alleged failure to provide a "free appropriate public education" as required by the EAHCA and that the EAHCH provided the sole remedy for such failure. We hold that the district court properly dismissed the § 504 and § 1983 claims and, accordingly, its judgment is affirmed.

I.

A.

Most of the facts are not disputed. Amy Austin was thirteen years old when this action was begun. Prior to entering school in 1974 she was diagnosed as being autistic or "austic-like." She was severely retarded, fearful and inhibited, and was lacking in language development. This early psychological evaluation found that she reacted to high stress by withdrawing. It recommended that she receive an educational program which would "emphasize the development of language, a low stress level, and a positive social interaction."

From January 1975 through June 1976 Amy attended a special education program for "autistic-like" children in Kent, Ohio. Apparently she responded well to the program. However, during this time her parents moved to a farm located in the Brown Local School District more than an hour's drive from Kent. The Brown district paid Amy's transportation to Kent after she moved to the district. Because of the long drive, however, Amy was enrolled in the fall of 1976 in a program for educable mentally retarded children operated by the

Brown district at the Malvern School, located nearer her home.

Amy attended the Malvern School program for three years. Her parents became dissatisfied with the program, however, believing that she had regressed severely while there. They met with school district officials and Malvern School personnel in June 1979. It was agreed that the Austins would investigate other possible programs for their daughter. In September 1979 Amy was placed in a program for multi-handicapped children at Lathrop School operated by the Canton City School District. Because the Austins continued to reside in the Brown Local School District, the Brown district remained responsible for Amy's education and for expenses incurred from her attendance at Lathrop.

The Austins again became dissatisfied with the program because they believed Amy's scholastic communications and behavioral skills deteriorated further. During 1979-80, however, they apparently did not complain directly to the Brown district officials. When Amy returned to the Lathrop School in September 1980 a new teacher was assigned to her class. During the fall a series of incidents occurred which her parents contended caused further regression. On November 17, 1980 the Austins filed for an impartial due process hearing regarding the appropriateness of Amy's placement, as provided for by Ohio law, Ohio Rev. Code Ann. § 3323.05(E) Page (1980), and by the EAHCA, 20 U.S.C. § 1415(c) (1976). The Austins continued to be dissatisfied with the Lathrop School program and withdrew Amy from the program in January 1981.

At the due process hearing held in March 1981 the Austins and school officials presented testimony, psychological test results and evaluations and other evidence regarding the appropriateness of Amy's placement in the Lathrop program. The hearing officer found that the Brown Local School District was providing Amy with the requisite free appropriate public education through placement in the Lathrop program.

The Austins appealed the findings to the State Board of Education which referred the matter to a referee for a report and recommendation. The referee recommended a determination that Amy was not being provided with the required education. The State Board reviewed and rejected the referee's finding.

B.

The plaintiffs instituted this action in December 1981 after the defendant State of Ohio Board of Education determined that Amy was being provided a "free appropriate public education" in accordance with federal and state law. The complaint sought judicial review of the state's finding pursuant to § 615 of the EAHCA, 20 U.S.C. § 1415(e) (2) (1976). It also claimed the right to relief based upon § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and the due process and equal protection clauses of the Fourteenth Amendment, enforceable through 42 U.S.C. § 1983. The Austins prayed for a declaratory judgment, an injunctive order requiring defendants to provide Amy a free appropriate public education, compensatory and punitive damages, costs and attorney fees. There were other claims which are not involved in this appeal.

The Austins named as defendants the Brown and Canton City School Districts, Bruce Schmidt, Brown's superintendent, the State of Ohio Board of Education and Department of Education, and Franklin B. Walter, State Superintendent of Public Education. Although they named "John Doe" defendants, they did not sue Amy's classroom teacher at Lathrop or the Lathrop principal.

After discovery the defendants moved for partial summary judgment dismissing the § 504 and § 1983 claims on the ground that no cause of action for failure to provide a free appropriate public education to Amy could be maintained except under the EAHCA. The district court agreed, and in an unpublished opinion and order granted partial summary judgment for the defendants. The plaintiffs then voluntarily dismissed the EAHCA claim and took this appeal from the final judgment dismissing the complaint without prejudice.

II.

The main thrust of the plaintiffs' pleadings and proof in the district court was directed to their claim that the defendants failed to provide Amy with "a free appropriate public education" as required by the EAHCA and state law. This claim was voluntarily dismissed by the plaintiffs, however, and is not part of this appeal.

The plaintiffs argued three issues in their brief in this court. They contended that money damages are recoverable under § 504 of the Rehabilitation Act of 1973 for failure to provide a free appropriate public education as required by EAHCA, that damages are recoverable under § 1983 for a Fourteenth Amendment equal protection vio-

lation for failure to provide the EAHCA-required education and that damages are recoverable under § 1983 for a Fourteenth Amendment due process violation for failure to provide the EACHA-mandated education or for "mistreatment" involved in providing an "inappropriate" education.

Success on two of these claims is foreclosed by intervening Supreme Court decisions which support the result reached by the district court.

In their complaint the plaintiffs sought relief under the Rehabilitation Act of 1973 for the same wrongs allegedly suffered by reason of the defendants' failure to comply with the requirements of the EAHCA. In *Smith v. Robinson*, — U.S. —, 104 S.Ct. 3457 (1984), the Supreme Court dealt with a claim for attorney's fees in a case where the plaintiffs combined claims under 42 U.S.C. § 1983 with claims under the EAHCA and § 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Court held that a handicapped child and the child's parents could not rely on both the EAHCA and § 504 of the Rehabilitation Act in an action for alleged failure to provide a free appropriate public education.

> Even assuming that the reach of § 504 [of the Rehabilitation Act] is coextensive with that of the [EAHCA], there is no doubt that the remedies, rights, and procedures Congress set out in the [EAHCA] are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the [EAHCA]

> by resort to the general antidiscrimination provision of § 504.

Id. at 3473. In another case decided the same day as *Smith*, the Supreme Court referred to that decision and stated: "§ 504 is inapplicable when relief is available under the Education of the Handicapped Act [EAHCA] to remedy a denial of education services." *Irving Independent School District v. Tatro*, — U.S. —, 104 S. Ct. 3371, 3379 (1984).

In the course of its opinion in *Smith* the Supreme Court also disposed of another issue raised by the plaintiffs in this action. It held that the plaintiffs could not base a claim under § 1983 that a handicapped child has been denied equal protection of the law on failure of school authorities to provide a free appropriate public education. The Court concluded that Congress intended the EAHCA to be "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 104 S. Ct. at 3468. Justice Blackmun wrote for the Court:

> We conclude, therefore, that where the [EAHCA] is available to a handicapped child asserting a right to a free appropriate public education, based either on the [EAHCA] or on the Equal Protection Clause of the Fourteenth Amendment, the [EAHCA] is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

Id. at 3470.

III.

As we view the record, the only issue not dismissed by the plaintiffs or foreclosed by controlling authority is

whether the district court improperly dismissed claims under § 1983 based on alleged violations of due process rights guaranteed by the Fourteenth Amendment. At oral argument plaintiffs' counsel contended that *Smith* does not support a dismissal of the § 1983 due process claim because that claim was not identical to the claim under the EAHCA. The defendants responded that allegations that Amy was mistreated at Lathrop were "interwoven" with the EAHCA claims and were not presented as an independent constitutional claim.

A.

The Austins argue that Amy was mistreated and excluded from school activities during the fall of 1980 while attending Lathrop School and that this series of incidents constituted violations by the defendants of her due process rights. They contend these violations are actionable under § 1983, independent of their claim that she was not provided a free and appropriate public education in accordance with the EAHCA.

They point on appeal to four specific types of mistreatment: isolation, corporal punishment, withholding Amy's coat and exclusion from a school field trip. Amy's teacher, principal and other school personnel, and her parents testified about these incidents in depositions and at the state due process hearing. Some of the facts, particularly those concerning paddling and withholding Amy's coat, are disputed.

The Austins contend Amy was repeatedly isolated from her classmates by being placed in a "time-out box" located in the school hallway and in her classroom and by

being sent to the offices of the school's principal and special education coordinator. Nothing in the record supports finding that Amy was ever placed in the "time-out box" in the hallway but her teacher and her principal testified that Amy was sent either to the principal's office or to a desk isolated from the rest of the class by a partition in order to get her to do her work or to control her behavior when she became unruly.

On one occasion the school principal Stephanie Patrick, administered corporal punishment to Amy by striking her once with a small ping-pong paddle. Amy's teacher, Janet Norman, had taken Amy to Ms. Patrick's office because she had been insubordinate and used "inappropriate language" three times. Ms. Patrick described Amy as having been "unruly," "making a big fuss and stomping, and just having a tantrum." Amy's teacher later testified she believed she had taken Amy to the principal that day because Amy was not doing her work, and that she never had to punish Amy for anything. Mrs. Austin testified the principal told her that the "inappropriate behavior" for which Amy was paddled was failing to answer when asked why she was slow doing her work.

In September 1980 Amy arrived home one day without the coat she had worn to school. The facts regarding this incident are somewhat obscure but apparently her teacher and other school personnel did not know the coat had been left until Mrs. Austin called about it. Although the principal testified that the coat was then immediately taken to the Austins by the bus driver, Amy's teacher and the special education coordinator, Ms. Novelli, recalled using the incident to get Amy to ask for the coat. The testimony is not clear as to whether Ms. Norman and Ms.

Novelli actually refused to give Amy the coat and made her go home without it because she would not ask for it.

The last incident relied upon by the Austins is Amy's exclusion from a school field trip. Ms. Norman denied Amy permission to go on the trip and sent her to the principal's office for a half day because she had not finished her work.

B.

The Austins contend that the testimony and exhibits in the record presented triable issues of fact regarding whether the defendants punished and excluded Amy from school privileges in violation of her constitutional right to substantive due process. This claim is not clearly and separately stated in the complaint. However, when they responded to the defendants' summary judgment motion, the plaintiffs did plainly argue, relying on cases concerning corporal punishment, that the "behavior modification techniques" used by the defendants presented a separate triable § 1983 claim. Nevertheless, the plaintiffs appeared to contend primarily that the behavior modification techniques were "inappropriate," and therefore violated the EAHCA. The § 1983 claim was presented as seeking relief from official action taken under color of state law which violated federal statutes, the EAHCA and the Rehabilitation Act, not as one which violated a constitutionally protected liberty interest.

While the Supreme Court has ruled out the use of § 1983 to remedy alleged equal protection violations in this type case, it has left open the possibility of pursuing an independent due process claim. In a footnote Justice Blackmun wrote, "On the other hand, unlike an indepen-

dent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the [EAHCA's] comprehensive scheme." 104 S. Ct. at 3470-71. However, since we conclude that no due process claim was presented as an independent challenge in this case, we have no occasion to decide here the requirements of such a claim.

IV.

While the plaintiffs argue forcefully on appeal that they presented an independent due process claim in this lawsuit, this was never made clear in the district court. Several facts render their present position suspect and support the defendants' arguments that the § 1983 claims were "interwoven" with the EAHCA claims to support those claims.

First, there is the fact that the teacher and principal who actually administered the discipline now complained of were never made parties defendant. On the other hand, the two school districts, a district superintendent and the State of Ohio Department of Education and the State Superintendent of Public Education were sued. These agencies and officials are responsible for administration of the EAHCA. Further, the final pretrial order stated that the plaintiffs contended the behavior modification techniques were "inappropriate," a standard used in the EAHCA.

Finally, the plaintiffs filed as exhibits to their memorandum in opposition to the defendants' motion for partial summary judgment affidavits of a specialist in the education of retarded children and a psychiatrist. The

education specialist dealt with all four disciplinary actions under the heading, "ISSUES RELEVANT TO AN APPROPRIATE EDUCATION." The entire thrust of the affidavit is to the effect that the administration of the disciplinary measures complained of denied Amy an appropriate education. Similarly, the affidavit of the psychiatrist is concerned with the appropriateness of the program and environment of Lathrop School, not with a claim of infringement of Amy's liberty interests.

The district court did not err in granting partial summary judgment dismissing all non-EAHCA claims. The § 1983 claims, as pled and argued in the district court, did not identify an independent due process violation based on infringement of Amy's liberty interest. Rather, relying on *Maine v. Thiboutot*, 448 U.S. 1 (1980), the plaintiffs argued that the defendants violated § 1983 by failing to obey the commands of two federal statutes, the EAHCA and the Rehabilitation Act. The district court correctly held that the plaintiffs could not circumvent the procedural requirements of the two comprehensive statutes dealing with handicapped individuals by going directly into federal court under § 1983 to obtain an adjudication that Amy had been denied the benefits of those statutes. This was one of the clear holdings of *Smith v. Robinson*.

The judgment of the district court is affirmed. No costs are allowed on appeal. The parties will bear their own costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE ALVIN I. KRENZLER

CASE NO. C81-2421A

AMY AUSTIN, a Minor, et al.

Plaintiffs

-vs-

BROWN LOCAL SCHOOL DISTRICT, et al.

Defendants

MEMORANDUM OF OPINION
AND ORDER

In November of 1980, plaintiffs Harold and Linda Austin instituted administrative proceedings pursuant to 20 U.S.C. § 1401, *et seq.*, Ohio Revised Code § 3323.01, *et seq.*, and the regulations promulgated thereunder in order to secure for their daughter, plaintiff Amy Austin, a free appropriate education. On April 24, 1981, the hearing officer found that the Brown Local School District and the Canton City School District, defendants in the instant action, provided Amy with a free appropriate education. The findings of the hearing officer were appealed to the State of Ohio Board of Education, which referred the matter to a referee. On or about October 13, 1981, the referee recommended to the State of Ohio Board of Education that it find that Amy Austin was not being provided with a free appropriate education. On or about November 9, 1981, the State of Ohio Board of Education overruled the referee's finding that Amy Austin was not

provided with a free appropriate education by the Brown Local School District and the Canton City School District.

Plaintiffs filed the instant complaint on December 2, 1981, seeking judicial review of the administrative proceedings below and the opportunity to present additional evidence. Jurisdiction of this court is conferred pursuant to §615 of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1415(e)(2) (hereinafter "EAHCA").

Plaintiffs allege that the defendants have excluded plaintiff Amy Austin, a handicapped child, from receiving the benefits of a free appropriate education in violation of the EAHCA; the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000, *et seq.* (hereinafter "DDABRA"). Plaintiffs also seek redress under 42 U.S.C. §1983, 1985(3), 1986 and 1988, alleging that their civil rights have been violated.

Defendant Bruce Schmidt, Superintendent of the Brown Local School District, filed an answer on December 24, 1981. Defendant Brown Local School District filed an answer on December 30, 1981. Defendants State of Ohio Board of Education, State of Ohio Department of Education and Franklin B. Walter, Superintendent of Public Instruction for the State of Ohio, filed an answer on January 4, 1982. Canton City School District filed an answer on February 18, 1982.

On February 22, 1983, the defendants filed a motion for partial summary judgment. In their motion, the defendants seek summary judgment with respect to those claims brought pursuant to 42 U.S.C. §1983, 1985, 1986 and 1988, the Rehabilitation Act of 1973, 29 U.S.C. §794,

et seq., and the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000, *et seq.* In other words, defendants seek summary judgment on all non-EAHCA claims. On March 14, 1983, plaintiffs filed a memorandum in opposition to defendants' motion for partial summary judgment.

For the reasons set forth below, this Court grants defendants' motion for partial summary judgment.

CIVIL RIGHTS CLAIMS

Defendants allege that plaintiffs may not pursue their claims under both the EAHCA and 42 U.S.C. §1983. Defendants claim that the EAHCA was intended to be the exclusive remedy in the instant case.

Suits to redress civil rights violations by state officials are authorized by 42 U.S.C. §1983, *et seq.*, but where Congress has foreclosed private enforcement of a statute in the enactment of that statute itself, or if the statute has not created enforceable rights under § 1983, then no private right of action exists. *Main v. Thiboutot,* 448 U.S. 1 (1980); *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981).

When a federal statute contains a sufficiently comprehensive remedial scheme, this evidences a congressional intent to foreclose an action brought pursuant to 42 U.S.C. §1983. *Middlesex County Sewage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981).

Section 615 of the EAHCA contains a sufficiently comprehensive remedial scheme evidencing congressional intent to foreclose bringing an action under 42 U.S.C. §1983. Section 615 of the EAHCA sets forth the procedures to

be followed to assure that handicapped children are provided a free appropriate public education. As part of its comprehensive remedial scheme, the EAHCA provides parents of handicapped children with an opportunity for an impartial due process hearing conducted by the state educational agency, the local educational agency, or an intermediate educational unit. Further, parents who are dissatisfied with the decision rendered at the administrative proceedings have the right to commence a civil action under the EAHCA in a state or federal court of competent jurisdiction. The state or federal court then has the power to grant such relief as it deems appropriate.

In light of the fact that Congress has provided for a specific comprehensive remedy for violations of the EAHCA, defendants' motion for partial summary judgment on plaintiffs' claims brought pursuant to 42 U.S.C. §1983, 1985, 1986 and 1988 is hereby granted.

THE REHABILITATION ACT

Plaintiffs allege that Amy Austin has been excluded from receiving the benefits of a free appropriate education under a federally funded educational program, in violation of the Rehabilitation Act of 1973, 29 U.S.C. §794, *et seq.* (hereinafter "Rehabilitation Act").

The Rehabilitation Act is not an affirmative action statute. Rather it is an anti-discrimination statute. This Act requires that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely due to his/her handicap. *Southeastern Community College v. Davis,* 442 U.S. 397 (1979). Plaintiffs claim that Amy Austin has been excluded from

receiving the benefits of a free appropriate education. The Rehabilitation Act does not concern or otherwise provide for a remedy for failure to provide a free appropriate education. Thus, defendants' motion for partial summary judgment concerning plaintiffs' claim under the Rehabilitation Act is hereby granted.

THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT

The plaintiffs' claim for relief under the Developmentally Disabled Assistance and Bill of Rights Act (hereinafter "DDABRA") must fail because the DDABRA does not create any substantive right to appropriate care and treatment.

The DDABRA states that "[p]ersons with developmental disabilities have a right to appropriate treatment, services and habilitation for such disabilities." 42 U.S.C. § 6010. Despite the language of Section 6010, no right to appropriate treatment is created by the DDABRA. Section 6010 merely recites a federal policy. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981). Therefore, defendants' motion for partial summary judgment is granted with respect to plaintiffs' claim for relief under 42 U.S.C. § 6000, *et seq.*

For the foregoing reasons, defendants' motion for partial summary judgment is granted.

IT IS SO ORDERED.

/s/ Alvin I. Krenzler
UNITED STATES DISTRICT COURT

(SEAL)

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII
324 EAST 11TH STREET
KANSAS CITY, MISSOURI 64106

OFFICE OF THE REGIONAL DIRECTOR

AFFIDAVIT

I, Cynthia A. Einhellig, being duly sworn, state as follows:

1) I am the Acting Regional Director of the Office for Civil Rights (OCR), U.S. Department of Education, Region VII.

2) Attached to this affidavit is a true and accurate copy of a closure letter that OCR sent to Mr. and Mrs. H. O. Austin, dated March 30, 1982. This letter reflects OCR's current position in Case No. 15811071.

3) Attached to this affidavit is a true and accurate copy of a closure letter that OCR sent to Mr. Bruce Schmidt, Superintendent of Brown Local Schools, Malvern, Ohio, dated March 30, 1982. This letter reflects OCR's current position in Case No. 15811071.

4) Attached to this affidavit is a true and accurate copy of the investigative report developed by OCR for Case No. 15811071. This report is maintained as an official record by OCR for Case No. 15811071.

/s/ Cynthia A. Einhellig
Acting Regional Director

STATE OF MISSOURI)
) SS:
COUNTY OF JACKSON)

On this 11th day of March 1983, before me, a Notary Public in and for said state, personally appeared Cynthia A. Einhellig, Acting Regional Director, Office for Civil Rights, Department of Education, known to me to be the person who executed the above Affidavit in behalf of the Office for Civil Rights, Department of Education, and acknowledged to me that she executed the same for the purposes therein stated.

/s/ Mary O. Hunter
Notary Public

My Commission Expires:
August 28, 1986

(SEAL)

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII
324 EAST 11TH STREET
KANSAS CITY, MISSOURI 64106

March 30, 1982

OFFICE OF THE REGIONAL DIRECTOR

Mr. and Mrs. H. O. Austin
7104 Lardon Road, R.R. #1
Waynesburg, Ohio 44688

Ref: 15811071

Dear Mr. and Mrs. Austin:

The Office for Civil Rights (OCR) has completed its investigation of the discrimination complaint filed against the Brown Local School District (District), Malvern, Ohio. You alleged that the District subjected your daughter, a handicapped student, to discriminatory treatment in its provision of an appropriate education, transportation services and in its due process procedures.

The Office for Civil Rights has the responsibility for enforcing the Regulation implementing Section 504 of the Rehabilitation Act of 1973 which states, at 34 CFR § 104.4(a):

> § 104.4 *Discrimination prohibited.*
>
> (a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or

activity which receives or benefits from Federal financial assistance.

Enclosed is a copy of the Section 504 Regulation for your reference.

During the on-site investigation, this Office reviewed the free appropriate education and transportation services provided to your handicapped daughter and the District's procedural safeguards afforded to parents.

The following issues were raised relative to the District's compliance with the Regulation implementing Section 504 of the Rehabilitation Act of 1973.

Our investigation did not reveal any evidence that would support your allegations that your handicapped daughter has been discriminated against by the District in the provision of transportation services.

The District paid mileage expenses to you on December 1, 1975 for your handicapped daughter to Kent City Schools. You were reimbursed for mileage for the time period prior to the implmentation of the Section 504 Regulation.

Based on the above, we conclude that the District has provided adequate transportation expenses for your handicapped daughter prior to the implementation of the Section 504 Regulation.

The Individualized Education Plan (IEP) dated November 24, 1980 was a continuation of the IEP conference held on May 21, 1980. At the IEP conference (May 21, 1980), the IEP team agreed to continue the program with its related services beginning August 27, 1980 for the school year 1980-81. You participated in the above meeting.

The 1980-81 IEP does not include an educational program that reflects your handicapped daughter's needs as identified in the evaluation. There were no behavioral considerations included in the IEP. Documents in your handicapped daughter's file disclosed that behavioral problems as well as other problems affect your handicapped daughter's receipt of an education. The District failed to consider the effect of these problems when providing an education to your handicapped daughter and thus failed to design a program to meet her individual educational needs. The District did not demonstrate that the handicapped student could not be educated in the regular classroom with the use of supplementary aids and services.

Even though the IEP was in effect at the beginning of the 1980-81 school year, it was incomplete. The Section 504 Regulation found at 34 CFR § 104.33(b)(1) (i) and (2) and § 104.34(a) states:

> § 104.33 *Free appropriate public education.*
>
> (b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . .
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.
>
> § 104.34 *Educational setting.*
>
> (a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the

> education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

You requested a written Impartial Due Process Hearing on behalf of your handicapped daughter on November 17, 1980.

The date of this hearing was March 17, 1981 which was untimely. However, a request for extension of the 45 day limit was made by the District's psychologist (Karl Schumacher) on December 19, 1980. Subsequent to this request for an extension, you cancelled the originally scheduled January, 1981 hearing.

Prior to the implementation of the due process hearing decision, you withdrew your handicapped daughter from the Lathrop School. The District has been unsuccessful in contacting you to arrange for your handicapped daughter's educational services since that time.

You have been provided and afforded due process. The Impartial Hearing Officer rendered a decision that the program provided by the Canton School District was appropriate.

In this matter, the District has complied with § 104.36 of the Regulation implementing Section 504 of the Rehabilitation Act of 1973 and as required by § 300a.503.

On February 25, 1982, the District submitted a letter to OCR committing the District to the following actions:

1. Develop an appropriate IEP to include an educational program that reflects your handicapped daughter's needs as identified in the evaluation. In such a development, specific reference shall be given to any behavior concerns which may be involved; and

2. Alternatives will be explored in order to assure that your handicapped daughter's IEP provides an appropriate special education in the least restrictive environment. All of these efforts shall be documented for reference and shall be in compliance with the applicable statutory and regulatory mandates (§ 104.33 (b) and § 104.34(a)). Upon completion of the new IEP, the District will submit a copy of the IEP to this Office within 30 days.

The District's actions as outlined above resolve the issues raised during the investigation of this complaint. As of the date of this letter, this Office is closing this Complaint. This determination is not intended and should not be construed to cover any other issues regarding compliance with Section 504 that may exist but are not discussed herein.

Upon request, OCR will provide copies of all subsequent correspondence to the recipient.

Under the Freedom of Information Act, 5 U.S.C. 552, and its pertinent Regulation, 34 CFR Part 5, this Office is required to release this letter in response to appropriate written requests.

If you have any questions, please contact Ms. Judith E. Banks, Division Director, Elementary and Secondary Education, at (816) 374-2158.

Sincerely,

/s/ Jesse L. High
Regional Director
Office for Civil Rights
Department of Education,
Region VII

Enclosure

(SEAL)

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION VII
324 EAST 11TH STREET
KANSAS CITY, MISSOURI 64106

March 30, 1982

OFFICE OF THE REGIONAL DIRECTOR

Bruce Schmidt, Superintendent
Brown Local Schools
West Main Street
Malvern, Ohio 44644

Ref: 15811071

Dear Superintendent Schmidt:

The Office for Civil Rights (OCR) has completed its investigation of the discrimination complaint filed against the Brown Local School District (District), Malvern, Ohio. The complainants alleged that the District subjected their daughter, a handicapped student, to discriminatory treatment in its provision of an appropriate education, transportation services and in its due process procedures.

The Office for Civil Rights has the responsibility for enforcing the Regulatiion implementing Section 504 of the Rehabilitation Act of 1973 which states, at 34 CFR § 104.4(a):

> § 104.4 *Discrimination prohibited.*
>
> (a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or

activity which receives or benefits from Federal financial assistance.

Enclosed is a copy of the Section 504 Regulation for your reference.

During the on-site investigation, this Office reviewed the free appropriate education and transportation services provided to the complainants' handicapped daughter and the District's procedural safeguards afforded to parents.

The following issues were raised relative to the District's compliance with the Regulation implementing Section 504 of the Rehabilitation Act of 1973.

Our investigation did not reveal any evidence that would support the complainants' allegations that their handicapped daughter has been discriminated against by the District in the provision of transportation services.

The District paid mileage expenses to the complainants on December 1, 1975 for their handicapped daughter to Kent City Schools.

The complainants were reimbursed for mileage for the time period prior to the implementation of the Section 504 Regulation.

Based on the above, we conclude that the District has provided adequate transportation expenses for the complainants' handicapped daughter prior to the implementation of the Section 504 Regulation.

The Individualized Education Plan (IEP) dated November 24, 1980 was a continuation of the IEP conference held on May 21, 1980. At the IEP conference (May 21, 1980), the IEP team agreed to continue the program with its related services beginning August 27, 1980 for the school year

1980-81. The complainants participated in the above meeting.

The 1980-81 IEP does not include an educational program that reflects the handicapped student's needs as identified in the evaluation. There were no behavioral considerations included in the IEP. Documents in the handicapped student's file disclosed that behavioral problems as well as other problems affect the handicapped student's receipt of an education. The District failed to consider the effect of these problems when providing an education to the handicapped student and thus failed to design a program to meet her individual educational needs.

The District did not demonstrate that the handicapped student could not be educated in the regular classroom with the use of supplementary aids and services.

Even though the IEP was in effect at the beginning of the 1980-81 school year, it was incomplete. The Section 504 Regulation found at 34 CFR § 104.33(b)(1)(i) and (2) and § 104.34(a) states:

> § 104.33 *Free apporpriate public education.*
>
> (b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . .
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

§ 104.34 *Educational setting.*

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

The complainants requested a written Impartial Due Process Hearing on behalf of their handicapped daughter on November 17, 1980.

The date of this hearing was March 17, 1981 which was untimely. However, a request for extension of the 45 day limit was made by the District's psychologist (Karl Schumacher) on December 19, 1980. Subsequent to this request for an extension, the complainants cancelled the originally scheduled January, 1981 hearing.

The due process hearing addressed all issues identified by the complainants.

Prior to the implementation of the due process hearing decision, the complainants with drew their handicapped daughter from the Lathrop School. The District has been unsuccessful in cantacting the parents to arrange for the handicapped student's educational services since that time. The complainants have been provided and afforded due

process. The Impartial Hearing Officer rendered a decision that the program provided by the Canton School District was appropriate.

In this matter, the District has complied with § 104.36 of the Regulation implementing Section 504 of the Rehabilitation Act of 1973 and as required by § 300a.503.

On February 25, 1982, the District submitted a letter to OCR committing the District to the following actions:

1. Develop an appropriate IEP to include an educational program that reflects the handicapped student's needs as identified in the evaluation. In such a development, specific reference shall be given to any behavior concerns which may be involved; and

2. Alternatives will be explored in order to assure that the handicapped student's IEP provides an appropriate special education in the least restrictive environment. All of these efforts shall be documented for refernce and shall be in compliance with the applicable statutory and regulatory mandates (§ 104.33(b) and § 104.34(a)). Upon completion of the New IEP, the District will submit a copy of the IEP to this Office within 30 days.

The District's actions as outlined above resolve the issues raised during the investigation of this complaint. As of the date of this letter, this Office is closing this complaint. This determination is not intended and should not be construed to cover any other issues regarding compliance with Section 504 that may exist but are not discussed herein.

Under the Freedom of Information Act, 5 U.S.C. 552, and its perinent Regulation, 34 CFR Part 5, this Office is required to release this letter in response to appropriate written requests.

We appreciate the cooperation your staff has extended to our investigators.

If you have any questions, please contact Ms. Judith E. Banks, Division Director, Elementary and Secondary Education, at (816) 374-2158.

Sincerely,

/s/ Jesse L. High
Regional Director
Office for Civil Rights
Department of Education,
Region VII

Enclosure

cc: Director of Educational Services
Chief State School Officer

INVESTIGATIVE REPORT

I. *Introduction*

A. Complainants: Mr. and Mrs. H. O. Austin
7104 Lardon Road, R.R. #1
Waynesburg, Ohio 44688
(216) 866-2852

B. Injured Party: Amy Austin
7104 Lardon Road, R.R. #1
Waynesburg, Ohio 44688
(216) 866-2852

C. Recipient: Bruce L. Schmidt, Superintendent
Brown Local School District
West Main Street
Malvern, Ohio 44644
(216) 863-0333

D. Representative: Not applicable

E. Docket Number: 15811071

F. Investigator: Vicki L. Taylor, EOS

II. *Jurisdictional Information*

A. The date the complaint was filed in our Office was January 29, 1981.

B. The discrimination is described as being continuous.

C. The legal authority for investigating the complaint against the Brown Local School District includes 34 CFR, Part 104 Sections 104.33(a)(b)(1)(2)(3)(c)(1)(2) and 104.36.

D. On-site to the Brown Local School District was conducted on April 22, 1981.

III. *Background*

Amy Austin, daughter of the complainants, is a twelve year old female diagnosed in late 1974 and early 1975 as showing characteristic signs of autism, depression and withdrawal.

Amy started attending the autistic classes at Kent, Ohio in January, 1975 and continued until June, 1976. In September, 1976, Amy attended the EMR classes in the Brown Local Schools. She remained in the EMR class until September, 1979. Brown Local School District's psychologist, Karl E. Schumacher, evaluated Amy in May, 1979, in which he recognized that the EMR class was not the appropriate placement.

Amy attended Lathrop School in Canton, Ohio from September, 1979 to January, 1981.

IV. *Statement of Allegation(s)*

The complainants alleged discrimination on the basis of handicap against the Brown Local School District. Specifically, the complainants alleged that the Brown Local School District has subjected their daughter, Amy Austin, to discriminatory treatment in its provision of an appropriate education, transportation services and due process procedures.

V. *Issue(s) to be Investigated in this Complaint*

Has the Brown Local School District discriminated against Amy Austin on the basis of handicap in denying her an appropriate education by:

(a) not providing transportation services; (104.33(c)(1)(2))

(b) not implementing her prescribed individual educational program; and (104.33(a)(b)(1)(2)(3))

(c) not adequately notifying Amy's parents of their procedural safeguards which would have provided them with due process. (104.36)

VI. *Case Chronology*

Complaint filed: January 29, 1981

Acknowledgement letter to the Brown Local School District: February 3, 1981

Case Assigned to EOS: February 18, 1981 (Lawrence Lee)

Case Reassigned to EOS: September 30, 1981 (Vicki Taylor)

Data Request and on-site letter mailed to Brown Local School District: April 7, 1981

The Brown Local School District is located in Malvern, Ohio. The District's 101's and 102's were not available for review.

There have been no other 504 complaints filed against the Brown Local School District.

VII. *Analysis of Information*

Issue #1—Transportation

Complainants' Position

The complainants alleged that even though the Brown Local School District paid them mileage for transportation cost while their daughter was in attendance at the Kent, Ohio program, the District should be responsible for the depreciation incurred by them while they used their personal automobile for the transportation of their daughter back and forth to school.

Recipient's Position

District officials stated that the complainants were paid mileage in accordance with District and the Ohio State Department of Education's policy. Therefore, the complainants are not eligible to receive any reimbursement for mileage which they have already been paid.

Evidence Obtained by OCR

The Brown Local School District paid mileage expenses to the complainants on December 1, 1975 for their daughter, Amy, to Kent City Schools. (TAB E3 and E32)

The complainants did not allege that the Brown Local School District did not reimburse them for transportation expenses. The complainants alleged that they were not reimbursed for the wear and tear of their car. There is no information in the Ohio State law that states that parents should be reimbursed for wear and tear on cars.

Summary/Conclusion

The complainants were reimbursed for mileage for the time period prior to the implementation of the Section 504 regulations.

Based on the above, we conclude that the Brown Local School District has provided adequate transportation expenses for the complainants' daughter prior to the implementation of the Section 504 regulations.

Issue #2—Appropriate Education

Complainants' Position

The complainants alleged that the appropriate education is not being provided at Lathrop School in the Canton, Ohio School District, where their handicapped daughter is placed. The complainants alleged that their handicapped daughter has not made any progress since attending Lathrop School. In addition, the complainants stated that their daughter's experience at Lathrop School has resulted in a change in behavior in her when she is at home. The complainants requested homebound instruction. (TAB B)

As an alternative, the complainants want their handicapped daughter placed in the Special Education program at Kent, Ohio, with the Brown Local School District paying all tuition cost. (The complainants' daughter previously had attended the program at Kent.) (TAB B)

The complainants stated that the IEP dated November 24, 1980 was signed by them however, they did

not realize what they were signing. The complainants stated that their signature only meant that they were present at the parent-teacher conference. (TAB E9)

Recipient's Position

The Brown Local School District officials state the class at Lathrop School in Canton, Ohio for the severe/multiple impairments, along with the related services of transportation and speech and language therapy was an appropriate program for Amy Austin, complainants' daughter. (TAB E20)

The District indicates that the complainants requested homebound instruction for Amy after taking her out of the program at Lathrop School on February of this year. (TAB B)

Evidence Obtained by OCR

The Individual Educational Program Plan (IEP) was not developed until three months after school had begun. (November 24, 1980) (TAB E8)

The IEP conference was comprised of the complainants (Harold and Linda Austin), Karl E. Schumacher, Brown Local School Psychologist, Ruth Novelli, resource teacher, and Mary K. Miller, classroom teacher. (TAB E8)

The IEP dated November 24, 1980 was a continuation of the IEP conference held on May 21, 1980. (Note: There is no record of the IEP dated May 21, 1980.) (SEE ADDENDUM TO INVESTIGATIVE REPORT)

At the IEP conference (May 21, 1980), the IEP team agreed to continue the program with its related services beginning August 27, 1980 for the school year 1980-81. Participants in this IEP were the complainants (Austins), Ruth Novelli, Mary K. Miller and JoAnn Keffler, speech therapist. (TAB E20)

Amy was placed at Lathrop School in the multihandicapped program where she was receiving related services of transportation and speech. The IEP placement date was September 24, 1979. (TAB E8)

Amy's IEP of November 24, 1980 did not include a statement of the child's present levels of education performance. The IEP does not demonstrate if Amy will be able to participate in regular educational programs. (TAB E8)

At the IEP conference on November 24, 1980 the related services of a physical therapist and an adaptive physical education class were added to Amy's program. (TAB E8) Participants were the complainants (Austins), Karl E. Schumacher, Ruth Novelli, JoAnn Keffler, Janet Norman, classroom teacher, and Stephanie Patrick, Principal and Canton School District Representative.

On February 19, 1981, Robert I. Lesowitz, M.D., Adult and Child Psychiatry, sent a letter to Mr. Karl Schumacher, Head of Special Education, Malvern School District stating that he did a psychiatric evaluation on Amy and found her to be in a regressed psychological and behavioral condition with her diagnosis being Infantile Autism. Dr. Lesowitz recommended than Amy receive home tutoring until the legal situation is settled. (TAB B)

On February 24, 1981, the complainants requested Karl Schumacher Head of Special Education, to provide a home tutor for Amy. On March 4, 1981, Mr. Schumacher sent a letter to the Austins requesting them to have Dr. Lesowitz fill out the lower portion of the Home Instruction Application. (Note: Schumacher needed the doctor's original signature.) (TAB B)

On March 11, 1981, Schumacher sent the complainants a letter stating per their meeting last night the letter from Dr. Lesowitz could be used in lieu of the report required on the Home Instruction Application

form SE 10(G). On March 24, 1981, the Austins (complainants) sent a letter to Bruce Schmidt, Superintendent of the Brown Local Schools, requesting Amy's tutoring hours be increased. (TAB B)

Summary/Conclusion

The handicapped student's 1980-81 Individual Education Plan (IEP) was developed on November 24, 1980, however, she began receiving services at the beginning of the 1979-80 school year. The failure to develop and implement IEP's at the beginning of each school year violated 34 CFR §104.33(b)(2). The Regulation implementing the Education of the Handicapped Act (EHA) Part B is incorporated into this specific section of the Section 504 regulation. The District is required to comply with the Public Law 94-142 Ohio State Plan which does comply with the EHA Regulation. Section 104.33(b)(1)(2) of the Section 504 Regulation and 45 CFR §121a.342(a) and (b)(1) state:

§104.33 *Free appropriate public education.*

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and . . .

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

§121.342 *When individualized education programs must be in effect.*

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall

have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; . . .

The 1980-81 IEP does not include the handicapped student's present level of performance or the extent to which the child will participate in a regular program. The District did not demonstrate that the handicapped student could not be educated in the regular classroom with the use of supplementary aids and services. This further violates the Section 504 regulation as cited above and as required by 45 CFR §121a.346(a) and (c) which states:

§121a.346 *Content of individualized education program.*

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance; and

(c) A statement of the specific special education and related services to be provided to the child and the extent to which the child will be able to participate in regular educational programs.

The District did not demonstrate that the handicapped student could not be educated in the regular classroom with the use of supplementary aids and services. This violates Section 104.34(a) of the Regulation implementing Section 504 of the Rehabilitation Act of 1973.

§104.34 *Educational setting.*

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for

the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by . . . .

Records indicate that since January 8, 1981 to the present Amy is being tutored at home. (TAB E31)

Issue #3—Due Process

Complainants' Position

The complainants requested a due process hearing by a letter dated February 21, 1981 to Ralph J. Fuscardo, Impartial Hearing Officer. (TAB E17)

The complainants requests that Amy be reinstated in the Kent school program (severe/multiple impairments class and related services) and all expenses incurred be reimbursed.

Recipient's Position

The Brown Local School District's position is that Amy Austin remain at Lathrop school where the program is the same as Kent and it is also close to the complainants' home. (TAB E5)

Evidence Obtained by OCR

Evidence indicates that the complaint was filed at the same time the Brown Local School District had set up mediation with the complainants to resolve the issues. (TAB B)

The following issues were identified as reasons for the complainants requesting the due process hearing:

(a) request of monthly review of child's program;

(b) placement with least restrictive environment;

(c) reinstatement of child in Kent Public School Program; and

(d) reimbursement of expenses provided for child's education. (TAB E5)

Records indicate that the complainants wrote a letter requesting a impartial due process hearing on November 17, 1980. The Brown Local School District received the written request on November 19, 1980. (TAB E5)

On December 1, 1980, the complainants sent a letter to Mrs. Navelli, Canton Ohio Schools, Lathrop School, Lathrop School, requesting a complete copy of Amy's records. (TAB B)

The Brown Local School District and the complainants agreed to the selection of the Impartial Hearing Officer, Ralph J. Fuscardo, (letter dated December 15, 1980). (TAB E5)

The Director of Special Education, Ralph D. Ickes notified the complainants in a letter dated December 17, 1980 that they could get copies of the child's records from Lathrop Elementary at their convenience for $2.00. (TAB B)

Records indicate a request for extension of the 45 day limit was made by the Brown Local Schools designee Karl Schumacher, School Psychologist, on December 19, 1980. (TAB E7)

The complainants and the District agreed that the disclosure conference would be held on January 29, 1981. On January 18, 1981, both disclosure and hearing was postponed at the request of the Austins (complainants). (TAB E5)

On February 26, 1981 letters were sent to all parties concerned that the Impartial Hearing Officer (IHO) had decided that the disclosure was to be held on March 5, 1981 and the hearing on March 17, 1981.

Records do not indicate if the complainants were notified in writing that they could request due process. The District's due process procedures were not obtained by the original investigator.

The Impartial Hearing Officer provided the following decision relative to the complainants' request for due process: (TAB E7)

1. Although the complainants' daughter at the time of the due process hearing was receiving home tutoring at parents' request while litigation was pending, it is in the best interest to return the complainants' daughter back to her classroom at Lathrop School. It was recommended that monthly periodic reviews be provided to the complainant.
2. The Brown Local School District establish a new IEP in accordance with the Federal regulations. (Note: This item refers go discipline.)
3. The complainants' handicapped daughter is properly placed at Lathrop School.
4. Issue of placement is in accordance with the Federal regulations/least restrictive environment.
5. Request for reimbursement of monies is denied.

The complainants were permitted access to all records and evidence to be used by the District during the disclosure meeting. (TAB E10)

The complainants were provided with notice of opportunity to appeal due process decisions to the State of Ohio. This was provided to the complainants on April 24, 1981. (TAB E4) The complainants stated they are knowledgeable of their right to appeal the decision to the State Department of Education. However, they have indicated during the interview that they will not pursue an appeal. The complainants have taken their children out of the Brown Local School District. (TAB D2)

The Brown Local School District has completed a self-evaluation in accordance with the Section 504 regulations. (TAB E27)

Summary

Both the Brown Local School District and the complainants were represented by legal counsel.

The complainants requested a written impartial due process hearing on behalf of their handicapped daughter on November 17, 1980.

The date of the hearing was March 17, 1981 which was untimely. However, a request for extension of the 45 day limit was made by the Brown Local School's psychologist (Karl Shumacher) on December 19, 1980.

The Impartial Due Process Hearing was then set for January 29, 1981. A mediation hearing was set for January 16, 1981 and Disclosure Conference on January 20, 1981, but were cancelled. A second mediation hearing was held on February 4, 1981. The Impartial Due Process Hearing was rescheduled from January 29, 1981 to March 17, 1981 at 4:00 p.m. The disclosure conference was held on March 5, 1981 and March 7, 1981.

P.L. 94-142 states:

§121a.512 *Timeliness and convenience of hearings and reviews.*

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

The due process hearing addressed all issues identified by the complainants.

Prior to the implementation of the due process hearing, the complainants withdrew their handicapped daughter from the Lathrop School and requested homebound instruction. The District is providing homebound instruction at their expense for the complainants' handicapped daughter.

The complainants have been provided and afforded due process. The Impartial Hearing Officer rendered a decision that the program provided by the Canton School District was appropriate.

The complainants have indicated that they have decided not to appeal the decision. The complainants still have the option of appealing the decision if they should so choose.

Furthermore, the complainants indicated that they will not have their children attend school in the Brown Local School District. The complainants have to this date withdrawn all children, including Amy, and placed them in another school district.

Conclusion

Based on the above, the Brown Local School District has complied with Section 104.36 of the Regulation implementing Section 504 of the Rehabilitation Act of 1973.

Recommendation

Based on the analysis of all the information gathered during this investigation, we have concluded that Amy Austin was denied an appropriate education.

It is recommended that the Brown Local School District be found in violation with 34 CFR, 104.33(b)(1)(2) and 104.34(a) of the Regulation implementing Section 504 of the Rehabilitation Act of 1973.

As appropriate remedies to the cited violations, the District must; if the student is reenrolled submit the following:

1. Develop an appropriate IEP for Amy Austin to include a statement of her present levels of educational performance; and

2. If Amy's parents reenroll her in the District, demonstrate that she can/cannot participate in regular educational programs with the use of supplementary aids and services.

ADDENDUM TO INVESTIGATIVE REPORT

PAGE 4—*Evidence Obtained by OCR*

December 7, 1981—1:50 p.m.—I Telephoned Superintendent Schmidt in reference to the IEP dated May 21, 1980. I asked Superintendent Schmit if the IEP dated November 24, 1980 was a continuation of the IEP conference held in May. Superintendent Schmidt stated that it was and that the parents attended. I asked him when did the program start. He stated the program started August 27, 1980.

Superintendent Schmidt stated that he would send me a copy of the May 21, 1980 IEP along with a copy of the due process procedures.

Based on the above, the IEP was in effect at the beginning of the 1980-81 school year, however it was incomplete. Therefore, the Brown Local School District's IEP developed in May, 1980 meets the requirements outlined in Section 504 and P.L. 94-142 in this matter. (SEE PAGE 6—regarding contents of IEPs)

STATE OF OHIO)
) SS:
COUNTY OF STARK)

AFFIDAVIT

Linda Austin, being first duly sworn, deposes and says that she is the mother of Amy Austin, born in August, 1969.

Affiant further says that Amy has been diagnosed as early as 1974 as being autistic-like.

Affiant further says that from January, 1975, through June, 1976, Amy attended the "autistic-like" special education program of the Kent City School District. Upon entering the program Amy was shy, withdrawn, and without any significant communication and social skills.

Affiant further says that after Amy's enrollment in the Kent program she observed a change in Amy. Her language skills improved, she became less withdrawn, better behaved, and generally, more confident.

Affiant further says that inspite of the success of the Kent program, the Brown Local School District transferred Amy in 1976 to the Malvern School, located within the school district, where she was placed in an educable, mentally retarded (E.M.R.) program. Amy remained in this program until 1979.

Affiant further says that after Amy's enrollment in Malvern School she noticed that Amy began to regress. Her scholastic and communication skills deteriorated, she became more withdrawn, and was unable to take part in family activities as she had in the past. Furthermore,

Amy's once positive attitude toward school deteriorated to the point of despondency.

Affiant further says that she and her husband repeatedly pointed out to Superintendent Schmidt the problems that Amy was having, but it was not until almost three years later that the Brown Local School District admitted to her that the Malvern E.M.R. program was not an appropriate placement for Amy.

Affiant further says that based upon the recommendations of the Brown Local School District Amy was enrolled, beginning in the fall of 1979, in the Lathrop School, Canton City School District, severe multiply handicapped program.

Affiant further says that after Amy's enrollment in Lathrop she observed that Amy began to lose weight, that her scholastic and communication skills continued to deteriorate, that Amy became even more withdrawn, and that she became fearful of attending school, complaining of harassment and insults by teachers and students alike.

Affiant further says that she was advised by Amy and by the staff of Lathrop School that Amy was paddled because she refused to do her work, that she was forced to sit in the school office or in a cardboard box in the hallway as punishment for not doing her work, that she was denied the right to go on field trips with other children, and that the Lathrop staff refused to permit Amy to go home one day with her coat in spite of poor weather which required that Amy have use of it, and which caused her to become severely ill.

Affiant further says that the employees of the Brown Local School District and the Canton City School Dis-

trict were hostile to her and her husband, and indifferent to Amy and her educational needs.

Affiant further says that as a result of the aforementioned hostile and indifferent attitude on the part of the school employees, and because of a fear that Amy's physical, emotional, and mental condition would further deteriorate if she continued to attend Lathrop School, affiant and her husband withdrew Amy from Lathrop School in January, 1981.

Affiant further sayeth naught.

/s/ LINDA AUSTIN

STATE OF OHIO)
) SS:
COUNTY OF STARK)

SWORN TO AND SUBSCRIBED IN MY PRESENCE, a notary public in and for said county and state, this 13th day of March, 1983.

/s/ Sheldon Stein
NOTARY PUBLIC

SHELDON STEIN, Attorney
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.08 R. C.

EXHIBIT "A"

Nancy K. Klein, Ph.D.
Cleveland State University
College of Education
Cleveland, Ohio 44115

March 14, 1983

Messrs. Sheldon Stein and
Frank J. Kundrat, Jr.
Attorneys at Law
1226 Standard Building
Cleveland, Ohio 44113

Re: Educational Report of Amy Austin

Gentlemen:

PURPOSE OF THIS REPORT:

The purpose of this report is to attempt to answer the following questions:

1. Did Amy Austin receive an appropriate education; and

2. Did the treatment Amy received at Malvern and Lathrop Schools prevent her from learning at the level that would be reasonably expected?

PERSONS INTERVIEWED FOR THIS REPORT:

1. Mrs. Linda Austin

2. Mr. Harold Austin

3. Miss Amy Austin

4. Dr. Jane Kessler

DOCUMENTS REVIEWED FOR THIS REPORT:

1. Testimony and court documents from the Impartial Hearing.

2. Depositions from:

   a. Janet Norman, teacher at Lathrop

   b. Ralph Ickes, Director of Special Education

   c. Bruce Schmidt, Superintendent

   d. Stephanie Patrick, Principal at Lathrop

3. Exhibits acquired from above persons during depositions, including IEP's, classroom materials, lesson plans and communications.

QUALIFICATIONS OF THIS REPORTER:

Nancy K. Klein, Ph.D. Briefly, Dr. Klein is an Associate Professor of Special Education at Cleveland State University. She taught mildly retarded children for 2½ years, was Curriculum Director of the Cuyahoga County Board of Mental Retardation (which serves moderately and severely retarded children and adults) for 5 years, and has done extensive research and writing regarding the educational needs of retarded children. She is responsible for the preservice education of students preparing to teach mildly and moderately retarded children at Cleveland State University.

BRIEF OVERVIEW OF CASE:

Amy Austin is a moderately retarded child with a history of withdrawn behavior and limited expressive language. She began her education in the Kent Schools where she progressed well. She was moved to Malvern School, into

a class for mildly retarded children, upon the recommendation of the Brown Local School District personnel after the parents had moved into the Brown School district. Testimony by Mr. Schmidt, the superintendent, indicate that this placement was considered inappropriate by the teacher and school psychologist. However, she was permitted to remain in that school situation for three years. After three years at Malvern School, Amy was placed at Lathrop School in a class for severely-multiply impaired youngsters.

During her second year at the school, in the class of a first year teacher who had no training or experience with children such as Amy, many problems surfaced. The teacher testified that Amy "refused" to do her work. She also testified that Amy was not a behavior problem to the degree that she interferred with the learning of other children. However, on many occasions, (an exact number is impossible to determine) she was sent *out* of the room to Mrs. Novelli (supervisor) and/or the principal, Mrs. Patrick as *punishment*. It should be noted that this form of punishment did not positively effect her behavior according to the principal.

In addition to many exclusions from class as a form of punishment, Amy was paddled and prohibited from participating on field trips. She was placed in a cardboard box as a "time-out" procedure. And, finally in this litany of punishment procedures, the teacher and supervisor, Miss Novelli, withheld Amy's coat (in October) from her because Amy was unable to use the complete sentence they required for her to secure it before she went home for the weekend.

ASSESSMENT OF AMY AUSTIN:

1. A Stanford Bineo Intelligence Test was administered to Amy in December 1982, by Dr. Jane Kessler. At that time, Amy was cooperative, eager to participate and appropriately responsive to the test situation.

2. A battery of educational assessments were administered to Amy by Dr. Nancy Klein in December 1982. Testing took place over a 3 hour period. During this time Amy was initially hesitant, but after spending time developing a rapport conducive to responding and playing some games, Amy was cooperative, eager to do tasks and laughed frequently. Amy was able to successfully complete visual discrimination tasks, identify a penny and nickel, demonstrate concepts of more, longer, bigger and smaller, write her name neatly and clearly from memory and add single digit number. She had difficulty with writing numbers and letters consecutively, although this was an objective in the IEP. She is able to put on her own coat, zip her coat, put on her boots and hat. She is able to follow two, three and four level commands, responded well to clearly stated directions and at no time refused to comply with a request to perform a task.

ISSUES RELEVANT TO AN APPROPRIATE EDUCATION:

Amy is a 13-year-old child with special needs including moderate mental retardation and behavioral difficulties. She is quiet and reserved upon initial meeting, however, she performs willingly when she is not under stressful conditions. There are several issues relevant to an appropriate education which are critical in this case:

1. The IEP prepared for Amy includes primarily academic objections. There is no inclusion of "functional skills" designed to develop independent functioning in any subject area.

2. There are no objectives in the IEP directed toward the development of appropriate school behavior (which was the behavior for which she was frequently punished).

3. There are no objections directed toward fostering of age-appropriate interpersonal relationships (testimony noted she kept "to herself").

4. There is no documented plan for developing independent behavior for completing school tasks.

5. The repetition of classroom assignments, with no linkage to "functional skills" becomes boring and lowers motivation; presentation of inappropriate tasks create behavior problems.

6. There is no evidence that the teacher modified required tasks or developed a plan for enhancing motivation for Amy to "do her work." By definition, this SMI class has children with both intellectual and behavioral deficits. Therefore, planning to meet the individual needs of children assigned in this type of class must include attention to what they are taught (subject matter) and innovative strategies for teaching them.

7. The reticent nature of Amy and her vulnerability to stress, coupled with her limited expressive language skills and the limits imposed by her intellectual deficites necessitate a structured program designed to enhance her performance. The type of punishment with which she was faced not only didn't foster learning, but created undue stress and fear related to school. Withholding particip-

tion on a field trip as punishment for not doing work (which may have been beyond her ability to perform) is not within the limits of acceptable education practice. In addition, the use of paddling, in my view, is a form of abuse. The testimony of the teacher says that Amy was *not* a behavior problem. No other punishment strategy had been effective. Certainly paddling was an extraordinarily unprofessional practice which does not meet acceptable standards for educating children who have retarded development and are vulnerable to stress.

Placing Amy in a cardboard box in the classroom as a "time-out" procedure for not doing work is another highly unacceptable practice for this child. And lastly, the expectation that Amy must say a complete sentence to gain access to her coat, and then to be denied her coat because she was unable to meet the expectation is absurd. Amy may not have remembered where she left her coat when asked. In addition, the stressful conditions surrounding the coat may have diminished her ability to use her words to request it. Any lastly, an 11-year-old (Amy was 11 at the time of the incident) moderately retarded child is unable to fully comprehend the consequences of not being allowed to take a coat home on Friday in October. This incident exemplifies the poor judgment employed by the professionals regarding an appropriate education (in this case an educational objective which carried severe consequences for non-attainment) for Amy Austin.

SUMMARY AND CONCLUSIONS:

After reviewing the evidence in this case, interviewing Mr. and Mrs. Austin and personally evaluating Amy's educational skills, I must conclude that Amy Austin has not

received an appropriate education. That is, neither the curriculum, the objectives listed in the IEP, nor the teaching strategies employed meet the standards of acceptable educational practice for moderately retarded children.

Specifically, the work given to Amy was not age-appropriate for an eleven year old, nor were there educational opportunities provided for her to learn "functional skills" such as shopping, learning to use money, setting the table, telling time (all math related). Reading did not include "functional" words such as men, women, exit, do not enter, nor was an effort made to apply reading to daily living skills as in cooking, use of cleaning agents or even leisure skill activities.

There were no documented plans for fostering the development of social skills nor a planned procedure for fostering independent work skills at school.

And finally, the only consistent documented intervention was punishment. Children placed in severe-multiply impaired classes have many special needs that require program modification and adaption. Consistently punishing a child for "not doing her work" by sending her out of the classroom indicates the teacher's inability to meet her needs. Having worked with Amy, I found quickly that moving around, adding a "light touch" and using a variety of approaches was essential to her sustained involvement. She responded extremely well to praise and success.

The fact that the teacher did not or could not modify assignments and approaches to involve Amy sufficiently so that Amy would do her work, resulted in Amy's being punished. Amy had learning problems, that is the reason she was placed in that particular special class. To punish

her by excessive exclusions from the classroom, denial of participation on highly desirable field trips, paddling and relegation to a cardboard box are instances of punishment which are excessive, abusive and do not conform to established practice. There is extensive research which describe acceptable practices. The goal of educating Amy is to teach her appropriate academic and work skills, not punish her for not having them.

The stress created by these punitive procedures made it impossible for this reserved, hesitant child to progress at the level reasonably expected, nor to benefit from the program offered to her. Under these circumstances of such negative conditions, it is highly probable that Amy regressed rather than progressed at the level anticipated for her.

/s/ Nancy K. Klein, Ph.D.

STATE OF OHIO)
) ss:
CUYAHOGA COUNTY)

Subscribed and sworn to before me this 14th day of March, 1983, by Nancy K. Klein.
(Seal)

/s/ Gary Lieberman
Notary Public.

GARY LIEBERMAN,
Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

EXHIBIT "B"

STATE OF OHIO)
) SS:
COUNTY OF STARK) *AFFIDAVIT*

Robert I. Lesowitz, M.D., being first duly sworn, deposes and says that he is a medical doctor, specializing in adult and child psychiatry.

Affiant further says that Amy Austin has been a patient of his since October 11, 1974, when he did diagnose her as being autistic or autistic-like.

Affiant further says that on or about February 20, 1981, he did write a report to Attorney Beverly Davis, Amy Austin's former counsel, concerning her condition as of that date. A true copy of that report is attached hereto and incorporated herein as if fully rewritten in this affidavit. The statements, observations, and conclusions contained therein are true as he verily believes, and accurately reflect Amy Austin's condition at such time.

Affiant further says that in his professional opinion, based upon reasonable medical certainty, and based upon evaluating Amy's progress through the review of pertinent reports, through the observations of Amy's family as reported to him, and upon his own personal observations, including but not limited to those contained in the attached report, that Amy regressed tremendously since leaving the Kent program and being enrolled in the Malvern and Lathrop programs.

Affiant further says that while autistic children who are properly educated remain at a constant level in their communicative, behavioral, and social skills, or they in-

crease such skills, it is highly unusual for a child such as Amy to actually regress. In affiant's opinion nothing in Amy's family environment caused or contributed to her regression.

Affiant further says that based upon the foregoing he did, in February, 1981, recommend that Amy be removed from Lathrop School and returned to the Kent program.

Affiant further sayeth naught.

/s/ Robert I. Lesowitz, M.D.

STATE OF OHIO)
) SS:
COUNTY OF STARK)

SWORN TO AND SUBSCRIBED IN MY PRESENCE, before me, a notary public in and for said county and state, this 14th day of March, 1983.

/s/ Sheldon Stein
Notary Public

SHELDON STEIN, Attorney
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.08 R.C.

ROBERT I. LESOWITZ, M. D.
Adult and Child Psychiatry
Mark Thirty Court Building
100-30th Street, N. W.
Canoton, Ohio 44709

Telephone 216-492-9900

February 20, 1981

Atty. Beverly Davis
808 Renkert Bldg.
Canton, Ohio 44702

Re: Amy Austin

Dear Ms. Davis,

I first say Amy on October 11, 1974 when she was a five year old nursery school student. I recommended at that time that parents take Amy to Goodwill for speech help.

I saw Amy again on February 19, 1981 for the purpose of re-evaluating her progress in recent years. Amy is currently an eleven year old who is going to Lathrop school in Canton and her parents are presently living in Waynesburg.

I have now reviewed the records over the last seven years, and I have had the opportunity to re-evaluate Amy as well as talk to Amy's mother and sister.

After I first saw Amy in 1974 she was entered in the program for autistic children at Kent State University. The classroom she was in contained four other autistic children and Amy was in that program for two years

and was making excellent progress. Whereas she was non-verbal when I first saw her, she became progressively more verbal and progressed in other ways such as improved communication and improved behavior as well as social adjustment. She next went into the EMR program in the Malvern school system for four years. Mother tells me in fact that Amy was retested and it was recommended by the Malvern school system that she go into TMR. For this last full year Amy has been in the multiply handicapped program at Lathrop school here in Canton.

According to mother Amy has regressed considerably since leaving the autistic program at Kent State University. She comes home from school almost every day now and cries from one to two hours. Also, according to mother, Amy has been paddled for not answering the teacher while at Lathrop.

Amy has been scapegoated tremendously in the school program and has been teased both at school and on the bus. She has begun to withdraw socially and her verbal skills have deteriorated. She again is tuning people out, in fact, she acts as though she doesn't hear. Her appetite has decreased and she has lost approximately ten pounds, and has been growing in height considerably, which has resulted in her becoming quite skinny. She has begun to use foul language and is swearing, but is generally not as talkative as she was. She has recently begun crying and vomiting in restaurants and has in general regressed tremendously.

In my evaluation of Amy yesterday she was extremely shy, withdrawn, very skinny, and totally non-communicative with me. She was able to whisper to her sister as

times but could not even maintain eye contact with me. During the interview she repeatedly hid behind her sister and showed continuous movement such as foot-shaking.

From evaluating Amy's progress through reports, through observations of mother and sister, as well as my own observation I can only conclude Amy has regressed tremendously since leaving the program at Kent State University. She is now appearing as a severely autistic child who has regressed and withdrawn and is becoming less verbal and less communicative. I can only come to one conclusion, that it would be in Amy's best interest to return to the autistic program at Kent State University. I am told that Kent re-evaluated her approximately one month ago and is still willing to take her back into the program. I feel this should be accomplished as rapidly as possible. .

If I can be of any further help please do not hesitate to call on me.

Very truly yours,

/s/ Robert I. Lesowitz, M.D.
RIL/sc

BEFORE THE STATE OF OHIO
BOARD OF EDUCATION

IN THE MATTER OF THE
EDUCATIONAL PLACEMENT OF
AMY AUSTIN

REPORT OF REFEREE
STATE LEVEL REVIEW

Submitted by:

David Wm. T. Carroll, Referee
SMITH & SCHNACKE
A Legal Professional Association
Suite 700, 100 East Broad Street
Columbus, Ohio 43215
(614) 224-6500

BEFORE THE STATE OF OHIO
BOARD OF EDUCATION

IN THE MATTER OF:

The Educational Placement
of Amy Austin
Report of Referee
State of Review

I. PURPOSE AND SCOPE

The parents of Amy Austin appeal to the State Board of Education in accordance with Ohio Administrative Code 3301-51-16(D) (5) from the Final Decision of Impartial Hearing Officer Ralph J. Fuscardo ("IHO" or "IHO Fuscardo") issued April 24, 1981, resulting from a due process hearing held March 17, 1981. By letter of May 22, 1981, the Superintendent of Public Instruction ap-

pointed this referee to review the record and IHO Report and to make appropriate recommendations to the State Board of Education for a final order in accordance with R.C. § 3323.05(F):

> "The state board of education shall establish procedures to assure that handicapped children and their parents are guaranteed procedural safeguards in decisions under this chapter relating to the identification, evaluation, or educational placement of a handicapped child or the provision of education or related services under this chapter.
>
> "The procedures shall include, but need not be limited to:
>
> . . .
>
> "(F) An opportunity for any party aggrieved by the findings and decision rendered in a hearing under division (E) of this section to appeal to the state board of education, which shall review the case and issue a final order."

Neither R.C. § 3323.05 nor O.A.C. 3301-51-16(D)(5) describe the standard for the Board's review on an appeal. However, both R.C. § 3323.05 and O.A.C. 3301-51-16 were adopted as part of Ohio's state plan for receiving federal financial assistance for the education of handicapped children in accordance with the Education for All Handicapped Children Act of 1975, 20 U.S.C.A. § 1411 *et seq.* 20 U.S.C.A. § 1415(c) mandates the standard for state level review:

> "If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the finding and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial

review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review."

Accordingly, your referee will review the hearing and will recommend an independent decision based upon the evidence taken at the hearing.

II. PROCEDURAL HISTORY

Following receipt of the parents' appeal by this referee, a great deal of correspondence has ensued. Copies of the correspondence are attached to this report as exhibits and are as follows:

Exhibit A - Austin appeal letter of May 13, 1981;

Exhibit B - Referee's letter of June 5, 1981;

Exhibit C - Referee's letter of July 2, 1981;

Exhibit D - Austin letter of July 10, 1981, received July 20, 1981;

Exhibit E - Referee's letter of July 23, 1981;

Exhibit F - Referee's letter of July 30, 1981;

Exhibit G - Referee's letter of August 4, 1981;

Exhibit H - Austin letter of August 4, 1981;

Exhibit I - Referee's letter of August 6, 1981;

Exhibit J - Austin letter of August 10, 1981;

Exhibit K - Referee's letter of August 20, 1981;

Exhibit L - Austin letter of August 26, 1981, with attached Childer's letter of August 19, 1981;

Exhibit M - Referee's letter of September 3, 1981.

As demonstrated in the correspondence, the Austins have made specific and general allegations of violations of their procedural and substantive rights. The Austin's have more or less specified the following allegations of error resulting from the impartial due process hearing and IHO report:

1. The IHO refused a postponement to permit Dr. Lesowitz to testify. Austin appeal letter, Exhibit A.

2. The hearing transcript contained "many errors." Austin appeal letter, Exhibit A.

3. The IHO "insults our [the Austins'] intelligence" by stating that "gripes and grievances should be settled or attempted to be settled at conference meetings." Austin appeal letter, Exhibit A.

4. After attempting mediation with the school district superintendent, "retaliation was taken upon our [the Austins'] two other children who were in his school." Austin appeal letter, Exhibit A.

5. The Austins challenge the IHO's finding that the disclosure and impartial due process hearing were postponed at the request of Mr. and Mrs. Austin because nowhere does it state why they postponed the hearing. Austin letter of July 10, 1981, Exhibit D.

6. The Austins challenge the IHO's finding that position statements, witness lists, potential exhibits and documents were exchanged because the hearing officer allegedly told the Austins to "shut up" when they objected to potential exhibits. Austin letter of July 10, 1981, Exhibit D.

7. The Austins also challenge the IHO's alleged finding that the Austins were represented by counsel at the disclosure conference. Austin letter of July 10, 1981, Exhibit D.

8. The Austins challenge the IHO's finding that the disclosure conference was reconvened. Austin letter of July 10, 1981, Exhibit D.

9. The Austins object that "the part about appropriate public education is *their* term by their law." (Emphasis in original). Austin letter of July 10, 1981, Exhibit D.

10. The Austins object that "there was more than *one* spanking of Amy Austin." (Emphasis in original). Austin letter of July 10, 1981, Exhibit D.

11. The Austins apparently object "the part [of the IHO's report] about signing the new IEP of 11/24/80." Austin letter of July 10, 1981, Exhibit D.

12. The Austins object to the IHO's conclusion that Amy's proper placement is in Lathrop School. Austin letter of July 10, 1981, Exhibit D.

13. The Austins complain about the IHO giving them an opportunity to choose a new IHO because their former representative had chosen the IHO and not the Austins personally. Austin letter of July 10, 1981, Exhibit D.

14. The Austins allege that the final decision was "planned by the state." Austin letter of July 10, 1981, Exhibit D.

15. The Austins complain that the referee dismissed "child abuse" as "gripes & grievances." Austin letter of July 10, 1981, Exhibit D.

16. The Austins complain that Stephanie Patrick was not permitted to testify at the impartial due process hearing. Austin letter of August 4, 1981, Exhibit H.

More generally, the Austins assert:

> "The findings & conclusions of the IHO are *all* ludicrous and we therefore challenge all of them." (Emphasis in original). Austin letter of July 10, 1981, Exhibit D.

Because the Austins challenged an alleged refusal of the IHO to schedule, reschedule or continue the impartial due process hearing in order to permit the testimony of Dr. Lesowitz and Stephanie Patrick, your referee proposed the taking of additional oral or written testimony in accordance with O.A.C. 3301-51-16(D)(5) which permits the State Board of Education to request further information. Your referee informed the Austins that failure to cooperate in the scheduling of additional oral testimony would result in a waiver of any objections to the failure of the hearing officer to require the attendance of those witnesses. Referee letter of July 30, 1981, Exhibit F; Referee letter of August 6, 1981, Exhibit I; and Referee letter of August 20, 1981, Exhibit K.

Notwithstanding repeated assertions that they refused to waive any rights, the Austins failed to cooperate in the scheduling of the taking of oral testimony. After the referee initiated the oral hearing, including the scheduling of Dr. Lesowitz, the Austins refused to make Dr. Lesowitz available for testimony. See Austin letter of August 26, 1981, Exhibit L, and Referee letter of September 3, 1981, Exhibit M. In addition, the Austins orally informed this referee that they do not want to have Ms.

Patrick's testimony at an additional hearing, apparently because they believe the testimony would be tainted by the passage of time.

As an example of the cooperation difficulties experienced by this referee, the Austins said in their letter of August 4 that they did not have legal counsel at that time to schedule a hearing "as he is on vacation." Exhibit H. Your referee responded in his letter of August 6, 1981, Exhibit I, that he would accommodate the vacation schedule of the Austins' lawyer. The Austins' letter of August 10, 1981, Exhibit J, then stated:

> "We appreciate your willingness to try to accommodate the vacation schedule of any lawyer we might hire. As of this time we do not have a lawyer. . . ."

III. FINDINGS OF FACT

At the time of the hearing, Amy Austin was diagnosed as being in a "regressed psychological and behavioral condition . . . being Infantile Autism." Petitioner Exhibit 4.

Amy Austin attended the Kent City Schools Multiply Handicapped Program in 1975 through June, 1976. When Amy entered the Kent program she was very shy and withdrawn. She had very limited speech and had difficulty relating to other people. At the conclusion of the program, she had made "good improvement." She had no difficulty getting along with other people and had no eye contact problems at that time. After the year's program she was able to communicate on a limited basis. Tr. 25-27.

Beginning September, 1976, Amy was placed in an Educable Mentally Retarded (EMR) program at Malvern School, Malvern, Ohio. Amy attended Malvern for two

school years until she was placed in Lathrop School in September, 1979. Respondent's Exhibit 6.

Lathrop School is operated by the Canton City School District. On or about September 17, 1979, the Austins and the educators at Lathrop School agreed to an individual education program for Amy. Respondent Exhibit 7. The program was reviewed and agreed by the parents and other conference participants on May 21, 1980.

Relations between the school and the Austins deteriorated beginning in September, 1980. In September, 1980, Mr. and Mrs. Austin asked the school nurse for help in dealing with the commencement of Amy's menstrual periods. It was not clear what help was requested, but the school nurse referred the Austins to Planned Parenthood.

On September 19, 1980, Amy apparently misplaced her coat at school. Amy's teacher located the coat at school the following Tuesday or Wednesday. After finding the coat, both Amy's teacher, Janet Norman, and the orthopaedic supervisor, Mrs. Novelli, questioned Amy about the coat and received no response from Amy. Ms. Norman sent a note to Mr. and Mrs. Austin informing them that she was trying to get Amy to tell where the coat was. Tr. 130, 134, 135, Petitioner Exhibit 8.

In addition, on September 24, 1980, Ms. Norman caused a student conduct report to be placed in Amy's file stating that Amy had committed the following infractions by failing to respond concerning the location of her coat: "Insubordination/Disrespect"; "Inappropriate Language." Respondent Exhibit 4.

On October 8, 1980, Ms. Norman again wrote a student conduct report on Amy Austin. This time the conduct

report was written because Amy failed to complete her work. Ms. Norman cited as infractions: "Insubordination/ Disrespect"; and "Disruptions."

On November 6, 1980, Ms. Norman wrote up another student conduct report stating that Amy refused to do her work. Respondent Exhibit 4. On this occasion, Lathrop School principal, Stephanie L. Patrick, administered corporal punishment. Ms. Norman listed the following infractions: "Insubordination/Disrespect"; "Inappropriate Language"; and "Repeated Violations 3 Times."

Throughout this time, Mr. and Mrs. Austin had disagreed with the manner in which Lathrop School had handled Amy. This has led to a number of minor confrontations between Mrs. Austin and Lathrop School. Respondent Exhibit 4.

Lathrop School scheduled a parent/teacher conference for November 24, 1980 at which Ms. Norman, Stephanie Patrick, the parents and others discussed a new individualized education plan.[1]

The parents refused to sign the new individualized education program because, by this time, they were unhappy with Amy's continued placement in Lathrop School. In fact, the Austins had requested an impartial hearing by a request received by the school district November 19, 1980.

---

[1] The Austins dispute that they received proper notice that this conference would be for the purpose of discussing a new individualized education program; however, since they did not sign the program, the issue of improper notice is moot.

IV. ANALYSIS

The Austins' specific allegations of error are numerous, so your referee will handle them in groups.

Allegations Nos. 2, 4, 6, 7, 8, 10, 13 and 14. None of these alleged errors are supported by any evidence in the record. The Austins assert that the hearing transcript contained "many errors," but the Austins made no attempt to supplement the transcript or to take advantage of the procedure for an additional hearing. In fact, the Austins refused to have any additional hearing.

The transcript reveals that the Austins were represented by counsel at the impartial hearing. Presumably the Austins' lawyers were unfamiliar with the need to make a record in the transcript of the various matters being complained of. The State Board of Education may not speculate as to what evidence might have been presented, but was not.

Allegations Nos. 1 and 16. These alleged errors relate to the unavailability of witnesses at the impartial due process hearing. Your referee scheduled a hearing for these witnesses to present testimony and warned the Austins that failure to cooperate would result in a waiver of any objections to the previous failure of these witnesses to provide testimony. However, the Austins failed to cooperate and allow the hearing to be held. Accordingly, your referee recommends that, notwithstanding the Austins' protestations to the contrary, the Austins have waived any alleged error by the IHO in failing to provide an opportunity for these witnesses to testify.

Allegations Nos. 3 and 9. These allegations of error are completely unintelligible. Accordingly, your referee recommends that they be overruled.

Allegation No. 5. The Austins complained about the IHO's finding that the disclosure conference and impartial due process hearing were postponed at the request of Mr. and Mrs. Austin because the IHO failed to state why the Austins postponed the hearing. The impartial hearing officer's finding about postponing the hearing had no effect on the outcome of this decision. Furthermore, the reasons for postponing such a hearing are immaterial and have no relevance to the issues in the hearing. Accordingly, your referee recommends that this alleged error be overruled.

Allegation No. 7. The Austins complain that the IHO found that the Austins were represented by counsel at the disclosure conference. Your referee finds no such finding in the IHO's Report. Furthermore, the record contains no evidence about the Austins' representation at the disclosure conference. Accordingly, the State Board has no basis upon which to make any kind of finding on this alleged error. Your referee recommends this error be overruled.

Allegations Nos. 12 and 15. Taken as one, the Austins object to the IHO's conclusion that Amy was properly placed in Lathrop School for the school year 1980/1981. The Austins object to Lathrop at least in part because of the corporal punishment received by Amy.

In the hearing, the burden of proof as to the adequacy and appropriateness of the proposed placement at

Lathrop was upon the superintendent of Brown Local Schools. See Rule 3301-51-16.

There seems to be no dispute on paper that the Lathrop School program is a "free appropriate education" for Amy. The Lathrop program is for severe multiply handicapped children, such as Amy, in Amy's age group. The parents request that Amy be placed in the program for severe multiply handicapped children run by the Kent public school system. The Kent program apparently offers the same services and the same educational opportunities.

The parents complain that Amy has not responded as well to the Lathrop program as she did to the Kent public school program which Amy previously attended. Mr. and Mrs. Austin also complain of mistreatment of Amy in the Lathrop school by the withholding of Amy's coat in cold weather, the denial of privileges for Amy, and the administering of corporal punishment. The Austins' position is that Lathrop School is not appropriate for Amy because of the manner in which the program, otherwise appropriate, has been run and because Amy has not progressed during her stay at Lathrop.

Other than lay testimony by the Austin family about the cause of Amy's behavioural and emotional regression since her attendance at Kent, the Austins submitted the following letter from Richard A. Langsdorf, D.O., marked Petitioner Exhibit 27:

> "Amy is an unfortunate young lady with multiple psychological and behavioural problems which are secondary to Infantile Autism. In the past, when she attended the program for Autistic children at Kent State University, she made excellent developmental

> progress. Since she has been placed back into the mainstream educational system she has regressed both emotionally and behaviourally."

Contrary to Dr. Langsdorf's statement, Amy was not "placed back into the mainstream educational system." Amy was first placed in an educable mentally retarded program and then into a severe multiply handicapped program. The record does not reveal the extent to which Dr. Langsdorf examined Amy. Nor does the record reveal the period of time during which Dr. Langsdorf provided treatment. As a result, Dr. Langsdorf's written conclusion is of questionable value:

> "It is my opinion that Amy's best chance for obtaining normal development would be to reinstate her into the Kent State's Program."

Nevertheless, it can reasonably be inferred from Dr. Langsdorf's letter of March 11, 1981 and the Austin family testimony that Amy has regressed both emotionally and behaviourally since leaving the Kent public school system.

None of the witnesses disputed (nor was it in issue) that the Malvern placement in the program for educable mentally retarded children was not appropriate for Amy. None of the parties disputed that Amy regressed during that period.

Harold Austin testified that Amy did show initial improvement at Lathrop, but she later became unhappy there. Tr. 160-162. The Lathrop records for the school year 1979/1980 demonstrate progress despite a considerable number of absences during the school year. See Respondent Exhibit 5, Attendance Record, and Primary School Academic Growth and Effort Sheet and Respond-

ent Exhibit 7, Sub-exhibits 4, 5 and 6. There was no indication of discipline problems during the school year 1979/1980. The Primary School Academic Growth and Effort Chart (i.e., report card), contained in Respondent Exhibit 5, indicates a need for improvement under "Shows Cooperative Attitude."

As noted previously, the Austins' relationship with Lathrop deteriorated in September, 1980, beginning with the school's referral of the Austins to Planned Parenthood for help in explaining to Amy about menstrual periods. There was no evidence in the record except hearsay testimony by Mrs. Austin of the propriety or impropriety of that referral by Lathrop School. The record contains absolutely no evidence of any impropriety in the school's referral and no evidence why such a matter could not be appropriately handled by Amy's mother. There is no explanation about how the Planned Parenthood referral reflects one way or the other upon Amy's educational placement.

Following the Planned Parenthood referral, there appears to have been several disputes between the Austins and the Lathrop school. If the Austins approached their concerns with Lathrop school with the same air of cooperation that they approached this referee, your referee can certainly appreciate the reasons for deterioration in the relationship between Lathrop and the Austins. However, any personality disputes between Lathrop personnel and the Austins are immaterial in determining whether Lathrop would provide a free appropriate public education for Amy Austin for the 1980/1981 school year.

The most recent psychological evaluation of Amy in the school's files was performed May 30, 1979 which indicates certain behavioural problems while also indicating withdrawal, poor reaction to criticism and hypochondrical tendencies. A much earlier psychological evaluation in the school records performed by J. P. Royer dated November, 1974, indicated that "high stress produces withdrawing behaviour." Amy's teacher, Janet Norman, was aware that Amy tended to withdraw upon being challenged. Tr. 132.

Dr. Lesowitz, a psychiatrist, indicated that an autistic child when challenged, questioned repeatedly, denied privileges and required to do something they are not capable of doing would suffer frustration and regression. Amy would display the same reaction under those circumstances. Petitioner Exhibit 28. Most of the witnesses agreed that corporal punishment is not an appropriate means to achieve behaviour modification for an autistic child in the absence of aggressive behaviour such as throwing things. Petitioner Exhibit 28, Tr. 36, 37, 41, 42, 52, 77, 116, 149, 150. Furthermore, it seems to your referee that paddling is awfully severe punishment of an autistic child who fails to complete school work. Paddling is not one of the "Classroom Management Techniques" for the severe multiply handicapped children as prepared by the school. Respondent Exhibit 5, Severe Multiple Handicap Program.

It appears that Amy does have behavioural problems as part of her handicap. Karl E. Shumacher concluded in his psychological evaluation report of May 30, 1979, Respondent Exhibit 7 and Petitioner Exhibit 21:

"Some behavioural interferences to attending and learning are present."

Neither the individualized education program prepared in September, 1979 nor the proposed individual education program prepared in November, 1980 address the behavioural problem or authorize the use of corporal punishment as a means of behavioural modification. Respondent Exhibit 7 and Petitioner Exhibit 16.

Since autism is characterized by withdrawal from the real world and by unresponsive behaviour, it seems to your referee inconsistent to treat such behaviour as a discipline problem characterizing the non-responsiveness as "Disrespect/Insubordination." The testimony of Ms. Norman and Mrs. Novelli regarding the incidents for which Amy was disciplined convince your referee that discipline was not appropriate under the circumstances. Miss Norman knew that Amy tended to withdraw when challenged. Tr. 132. The withdrawal behaviour exhibited by Amy as described by Ms. Norman in connection with the coat incident and the three failures to perform work, sound to your referee like manifestation of autistic behaviour as described by both Respondent's Exhibit 3 and Petitioner's Exhibit 2. See Tr. 124-126, 130, 139-143.

For an education to be considered "appropriate" for a handicapped child, the educational agency must develop and follow an individualized education program. R.C. § 3323.01(D) and O.A.C. 3301-51-18(F). The individualized education program must contain "a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs." R.C. § 3323.01(E).

Amy's individualized education program did not mention that Amy would be subjected to confrontation and corporal punishment as "educational services" aimed at overcoming Amy's handicap. If the disciplinary measures taken with Amy were truly "Behaviour Management Techniques" for autistic children such as Amy, such techniques should have been disclosed on Amy's individualized education program. By using corporal punishment as a technique to manage Amy's autism, your referee believes Lathrop violated Amy's individualized education program. Whether it be due to the effects of the discipline, peer pressure, the osmotic effect of parents' attitudes, or some other reason, it is clear that Amy Austin was not progressing in Lathrop School during the school year 1980/1981.

Taking all of these facts into consideration, your referee concludes that the superintendent has not met his burden of proof that the proposed placement at Lathrop School for the school year 1980/1981 was not receiving an "appropriate public education" in conformity with the individualized education program pursuant to R.C. § 3323.01 at Lathrop School.

The Austins request placement in the Kent City public schools. However, the record does not reflect what other alternatives might be available. With respect to the Kent public school program, the superintendent did not dispute that the Kent program would also be an appropriate public education. However, the record does not reflect what other severe multiply handicapped programs would be available. 34 C.F.R. § 300.522 provides:

"Each public agency shall insure that:

"(a) Each handicapped child's educational placement:

"(3) is as close as possible to the child's home. . . ."

In the confidential psychological report prepared at Kent in 1976, Amy's teacher noted:

> "Because of the long distances the Austins had to travel to bring Amy to school, Amy was absent approximately 50% of the school days. Due to the great amount of absences, I would like to see Amy return to the home school district so that she will be able to attend school 100% of the school days instead of only 50%.
>
> Diane Thomison, Teacher"

Respondent's Exhibit 7.

Your referee concludes that the record is insufficient to determine whether the proposed alternative placement at Kent public school is in fact the most appropriate free public education or even an appropriate public education. However, since the 1980/1981 school year has concluded, the question of what alternative placement is ot be considered for that year is moot.

Turning to the Austin's general objection to the findings and conclusions of the IHO, your referee notes only one other substantial issue. The Austins requested reimbursement of certain monies in the brief filed by the Austins' lawyers at the hearing. The hearing transcript reveals no evidence of the sums allegedly expended. Without evidence, there is no basis to order the school district to reimburse money to the Austins.

V. RECOMMENDATIONS

Based upon the foregoing, your referee recommends that the State Board of Education issue a final order:

1. Finding that Amy Austin's parents had a hearing before an impartial hearing officer in accordance with R.C. § 3323.05(E);

2. Finding that R.C. § 3323.03 requires that each handicapped child of compulsory school age residing within the district be placed in an appropriate education program;

3. Finding that Amy Austin is a handicapped child of compulsory school age; and

4. Overruling IHO Fuscardo's recommendations and ordering that the superintendent failed to meet his burden of proof that Amy Austin was provided a free appropriate education at Lathrop school for the 1980/1981 school year.

Respectfully submitted,

/s/ David Wm. T. Carroll, Referee
SMITH & SCHNACKE
A Legal Professional Association
Suite 700, 100 East Broad Street
Columbus, Ohio 43215
(614) 224-6500

Dated: October 13, 1981

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1370

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMY AUSTIN, A MINOR, et al.,

Petitioners

v.

BROWN LOCAL SCHOOL DISTRICT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel of Record for Respondents

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

KIMBALL H. CAREY
MEANS, BICHIMER, BURKHOLDER & BAKER CO., L.P.A.
42 East Gay Street, 14th Floor
Columbus, Ohio 43215
Telephone: (614) 221-3135

THOMAS P. ALBU
Assistant Law Director
Department of Law
City Hall Building
Canton, Ohio 44702
Telephone: (216) 489-3251

ANTHONY J. CELEBREZZE, JR.
Attorney General
GARY E. BROWN
Assistant Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 466-8600

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether in an action involving the appropriateness of the education provided to a handicapped child, a plaintiff may proceed under the Civil Rights Act of 1871 as amended (42 U.S.C. §1983) for alleged violations of the Rehabilitation Act of 1973 (29 U.S.C. §794) and constitutional provisions as well as under the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 *et seq.*) when no independent due process claim has been presented to the District Court.

2. Whether in an action involving an alleged denial of a free appropriate public education, the remedial provisions of the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 *et seq.*) are exclusive and a claim under the Rehabilitation Act of 1973 (29 U.S.C. §794) is not available.

LIST OF ALL PARTIES

Petitioners:	Amy Austin, a minor Harold Austin Linda Austin
Respondents:	Brown Local School District State of Ohio Board of Education State of Ohio Department of Education Franklin B. Walter (Superintendent of Public Instruction) Bruce Schmidt (Superintendent Brown Local School District) Canton City School District

TABLE OF CONTENTS

Questions Presented i

List of All Parties ii

Table of Authorities iv

Opinions and Judgments Below 1

Jurisdiction 2

Statement of the Case 3

Summary of Argument 7

Argument 8

Conclusion 13

Certificate of Service 15

TABLE OF AUTHORITIES

Cases	Page
Austin v. Brown Local School District, 746 F. 2d 1161 (6th Cir. 1984)	8,9,11,12
Irving Independent School District v. Tatro, 468 U.S. ____, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984)	10
Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980)	12
Smith v. Robinson, 468 U.S. ____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984)	6,7,9,10,11,12,13

Constitutional Provisions

Fourteenth Amendment, U.S. Constitution	5,8,10

Statutes

The Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 *et seq.*)	5,7,8,9,10,11,12
20 U.S.C. §1415(c)	4
20 U.S.C. §1415(e)(2)	5
§504 of the Rehabilitation Act of 1973 (29 U.S.C. §794)	5,7,8,9,10,12
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	5,7,8,9,10,11,12
Ohio Revised Code §3323.01 *et seq.*	5
Ohio Revised Code §3323.05(E)	4
Ohio Revised Code §3323.05(F)	4

OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit is now reported at 746 F. 2d 1161. The Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on October 25, 1984. On February 6, 1985, Justice O'Connor signed an order extending the time in which to file a petition for a writ of certiorari to and including February 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

IMPARTIAL DUE PROCESS HEARING:

Amy Austin was thirteen (13) years old when this action was begun, and she had been diagnosed as being autistic or "autistic-like." Her public school education began in approximately January of 1975 when she was enrolled in the University School in Kent, Ohio, which was a special education program for "autistic-like" children operated by the Kent City School District.

In July of 1975, the Petitioners moved to a farm located in the Brown Local School District in Carroll County, Ohio, which was more than a one (1) hour drive from Kent. However, Amy continued to attend the University School, and the Brown Local School District paid for Amy's transportation to Kent. At the beginning of the 1976-1977 school year, Amy was enrolled in a new program for educable mentally retarded children which had been established by the Brown Local School District at the Malvern School. This new placement was located closer to Amy's home, and it was made because Amy's parents had indicated to Bruce Schmidt (then the Superintendent of the Brown Local School District) that they did not like Amy being so far from home, and that they were unhappy with the Kent program. Amy remained in the program at Malvern School through the 1978-1979 school year.

By 1979, however, the Petitioners had become dissatisfied with Amy's progress at Malvern School, and in June of 1979, a meeting was held between Amy's parents and Malvern School officials to discuss Amy's educational placement. At the conclusion of this meeting, it was decided that the Petitioners would investigate the availability of other possible programs for Amy. Subsequently, in September of 1979, for the 1979-80 school year, Amy was placed in the Lathrop School operated by the Canton City School District after Petitioners had observed and approved the placement. The Brown Local School District, as the school district of residence, paid the expenses incurred from this placement.

At some point during the 1980-81 school year, the Petitioners became dissatisfied with the Lathrop program. This dissatisfaction apparently stemmed from certain disagreements between the Petitioners and Lathrop School officials on the question of discipline as it related to Amy's individualized educational plan. The Petitioners did not, however, advise officials of the Brown Local School District of their concerns.

On November 17, 1980, the Petitioners requested an impartial due process hearing pursuant to Ohio Revised Code §3323.05(E) and 20 U.S.C. §1415(c) for the purpose of reviewing the appropriateness of Amy's individualized educational program. The Petitioners continued to be dissatisfied with the Lathrop School program, and on January 9, 1981, they voluntarily withdrew Amy from the program. For several weeks thereafter and during the pendency of the impartial due process proceedings, the Brown Local School District provided home tutoring for Amy.

On March 17, 1981, an impartial due process hearing was held, and the Petitioners and school officials presented testimony, psychological test results and evaluations, and other evidence relating to the appropriateness of Amy's educational placement in the Lathrop School program. On April 24, 1981, the Impartial Hearing Officer issued his decision finding that Amy was, in fact, being provided a free appropriate public education by the Brown Local School District.

The Petitioners elected to appeal the findings and decision of the Impartial Hearing Officer to the Ohio State Board of Education in accordance with Ohio Revised Code §3323.05(F). Pursuant to the state statute, the appeal was referred to a Referee for a report and recommendation. On October 13, 1981, the Referee issued his Report which recommended that the State Board of Education find that Amy was not being provided with a free appropriate public education by the Brown Local School District. Thereafter,

on November 9, 1981, the Ohio State Board of Education reviewed and rejected the Referee's recommendation and, in essence, affirmed the decision of the Impartial Hearing Officer and found that Amy was being provided a free appropriate public education in accordance with federal and state law.

UNITED STATES DISTRICT COURT PROCEEDING:

Pursuant to the provisions of 20 U.S.C. §1415(e)(2), a complaint was filed on behalf of the Petitioners in the United States District Court for the Northern District of Ohio, Eastern Division, on December 2, 1981. The complaint sought judicial review of the state administrative proceedings conducted pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §1401 *et seq.;* Ohio Revised Code §3323.01 *et seq.;* and the regulations promulgated thereunder. In addition, the Petitioners, in their complaint, claimed a right to relief predicated upon §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the due proces and equal protection clauses of the Fourteenth Amendment to the United States Constitution enforceable through 42 U.S.C. §1983 for the alleged failure to provide a free appropriate public education.

However, it was the position of the Respondents that only the provisions of the EAHCA offered a proper basis for the claims being advanced by the Petitioners. Accordingly, after discovery, all of the Respondents joined in filing a motion for partial summary judgment in their favor with respect to those claims brought pursuant to 42 U.S.C. §1983, §504 of the Rehabilitation Act, and all other claims not brought pursuant to the EAHCA. On April 26, 1983, the District Court issued an unpublished opinion and order which granted the Respondents' motion for partial summary judgment. Thereafter, on the day of trial, the Petitioners moved the District Court for permission to voluntarily

dismiss their remaining claim under the EAHCA, and this motion was granted by the Court.

UNITED STATES COURT OF APPEALS PROCEEDINGS:

A notice of appeal from the decision of the District Court was filed in the United States Court of Appeals for the Sixth Circuit on behalf of the Petitioners on May 23, 1983. The Court of Appeals issued its decision on October 25, 1984, which affirmed the judgment of the District Court in all respects based upon the authority of the intervening decision of this Court in *Smith v. Robinson*, 468 U.S. ____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984).

SUMMARY OF ARGUMENT

In *Smith v. Robinson*, 468 U.S. _____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), this Court recently held that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.*, provides the exclusive avenue through which a handicapped child and his parents or guardian may protect the constitutional right of the handicapped child to a free appropriate public education in the absence of any independently alleged due process violation. In the case *sub judice*, the Court of Appeals correctly determined that the Petitioners' claims under 42 U.S.C. §1983 and §504 of the Rehabilitation Act of 1973 were precluded by the standards announced by this Court in *Smith*. Accordingly, both the decision of the Court of Appeals in the case *sub judice* and this Court's decision in *Smith* should be left undisturbed.

ARGUMENT

The Petitioners contend on page ten (10) of their Petition for Writ of Certiorari that they are seeking a clarification of this Court's position "in a situation where severe injury has resulted from failure to provide a handicapped child with a free appropriate education and where the remedy provided for by the EAHCA is not adequate." The Petitioners, then, go on to refer in several places in their Petition to certain unspecified "injuries" allegedly suffered by Amy Austin as a result of the alleged failure of the Respondents to provide her with a free appropriate public education and for which the EAHCA does not provide an adequate remedy. The Respondents respectfully submit that the representations made by the Petitioners respecting Amy's alleged injuries, such as the reference to the regression of her learning and interpersonal skills appearing on page eleven (11) of the Petition, are simply not supported by the record in this case. In addition, both the District Court and the Court of Appeals concluded that the EAHCA does, within the context of this case, provide the appropriate avenue through which the Petitioners may seek an adequate remedy for their claims. The Court of Appeals, in an opinion by Chief Judge Lively, stated:

> The plaintiffs [Petitioners] argued three issues in their briefs in this court. They contended that money damages are recoverable under §504 of the Rehabilitation Act of 1973 for failure to provide a free appropriate public education as required by EAHCA, that damages are recoverable under §1983 for the Fourteenth Amendment equal protection violation for failure to provide the EAHCA-required education and that damages are recoverable under §1983 for a Fourteenth Amendment due process violation for failure to provide the EAHCA-mandated education or for "mistreatment" involved in providing an "inappropriate"

education.

> Success on two of these claims is foreclosed by intervening Supreme Court decisions which support the result reached by the district court.
>
> 746 F. 2d at 1163-1164

The Respondents, like the Court of Appeals, believe that the issues raised in the case *sub judice* were decided and are controlled by the recent decision of this Court in *Smith v. Robinson*, 468 U.S. _____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). Additionally, the Respondents respectfully submit that no further clarification of that decision is necessary.

In *Smith*, this Court considered a claim for attorney fees in a case, identical to the case *sub judice*, where the plaintiffs combined claims under 42 U.S.C. §1983 with claims under the EAHCA and under §504 of the Rehabilitation Act, and this Court concluded that a handicapped child and his parents could not rely on both the EAHCA and §504 of the Rehabilitation Act in an action for an alleged failure to provide the child with a free appropriate public education. This Court, in an opinion authored by Mr. Justice Blackmun, stated:

> We note the uncertainty regarding the reach of §504 to emphasize that it is only in the EHA that Congress specified the rights and remedies available to a handicapped child seeking access to public education. Even assuming that the reach of §504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of §504.
>
> 468 U.S. at _____, 104 S. Ct. at 3473

Further, in *Irving Independent School District v. Tatro*, 468 U.S. _____, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984), decided the same day as *Smith*, this Court observed that "§504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services." 468 U.S. at _____, 104 S. Ct. at 3379. Therefore, the Respondents respectfully submit that the Court of Appeals was correct in concluding in the case *sub judice* that the Petitioners' claims under §504 of the Rehabilitation Act were precluded by this Court's teachings in the *Smith* case.

Likewise, the Court of Appeals was correct in holding that the Petitioners' equal protection claim under 42 U.S.C. §1983 was also foreclosed by this Court's holding in *Smith*. Mr. Justice Blackmun wrote:

> In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result. Rather, it indicates that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.
>
> 468 U.S. at _____, 104 S. Ct. at 3470

Finally, the Court of Appeals was correct in holding that the District Court had properly dismissed the Petitioners' claims under 42 U.S.C. §1983 based upon alleged violations of due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. The

Petitioners contend that their due process claims are separate from their other claims and were presented as independent constitutional claims, and they rely upon the following language used by Mr. Justice Blackmun in a footnote:

> On the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme.

468 U.S. at _____, 104 S. Ct. at 3470-3471, n. 17

However, the Respondents assert, and the Court of Appeals agreed, that the due process claims were interwoven with the EAHCA claims and, therefore, were not presented as an independent challenge. 746 F. 2d at 1166. The Court of Appeal's analysis, though lengthy, is set forth here as follows:

> While the plaintiffs argue forcefully on appeal that they presented an independent due process claim in this lawsuit, this was never made clear in the district court. Several facts render their present position suspect and support the defendants' arguments that the §1983 claims were "interwoven" with the EAHCA claims to support those claims.
>
> First, there is the fact that the teacher and principal who actually administered the discipline now complained of were never made parties defendant. On the other hand, the two school districts, a district superintendent and the State of Ohio Department of Education and the State Superintendent of Public Education were sued. These agencies and officials are responsible for administration of the EAHCA. Further, the final pretrial order stated that the plaintiffs contended that the behavior modification techniques were "inappropriate," a standard used in the EAHCA.

> Finally, the plaintiffs filed as exhibits to their memorandum in opposition to the defendants' motion for partial summary judgment affidavits of a specialist in the education of retarded children and a psychiatrist. The education specialist dealt with all four disciplinary actions under the heading, "ISSUES RELEVANT TO AN APPROPRIATE EDUCATION." The entire thrust of the affidavit is to the effect that the administration of the disciplinary measures complained of denied Amy an appropriate education. Similarly, the affidavit of the psychiatrist is concerned with the appropriateness of the program and environment of Lathrop School, not with a claim of infringement of Amy's liberty interests.
>
> 746 F. 2d. at 1166

Thus, the Court of Appeals was correct in concluding as follows:

> The §1983 claims, as pled and argued in the district court, did not identify an independent due process violation based on infringement of Amy's liberty interest. Rather, relying on *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), the plaintiffs argued that the defendants violated §1983 by failing to obey the commands of two federal statutes, the EAHCA and the Rehabilitation Act. The district court correctly held that the plaintiffs could not circumvent the procedural requirements of the two comprehensive statutes dealing with handicapped individuals by going directly into federal court under §1983 to obtain an adjudication that Amy had been denied the benefits of those statutes. This was one of the clear holdings of *Smith v. Robinson*.
>
> 746 F. 2d at 1166

Therefore, the Respondents respectfully submit that it is

readily apparent that the Court of Appeals has faithfully applied this Court's holdings in *Smith v. Robinson*, and the decision of the Court of Appeals in this case and the decision of this Court in *Smith* should be left undisturbed.

CONCLUSION

In light of the foregoing, the Respondents strongly urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel of Record for Respondents

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

KIMBALL H. CAREY
MEANS, BICHIMER, BURKHOLDER
& BAKER CO., L.P.A.
42 East Gay Street, 14th Floor
Columbus, Ohio 43215
Telephone: (614) 221-3135

THOMAS P. ALBU
ASSISTANT LAW DIRECTOR
DEPARTMENT OF LAW
CITY HALL BUILDING
Canton, Ohio 44702
Telephone: (216) 489-3251

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL

GARY E. BROWN
ASSISTANT ATTORNEY GENERAL
STATE OFFICE TOWER
30 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 466-8600

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondents in Opposition to Petition for Certiorari was served upon Sheldon Stein, Counsel of Record for Petitioners, 1226 Standard Building, P.O. Box 5606, Cleveland, Ohio 44101; Stanley Morganstern, Attorney for Petitioners, Suite 800, One Public Square, Cleveland, Ohio 44113; and Cesare Refe, Attorney for Petitioners, 1210 Standard Building, Cleveland, Ohio 44113, by placing same in the regular U.S. Mail service, postage pre-paid, this _____ day of March, 1985.

DENNIS M. WHALEN
Counsel of Record for Respondents